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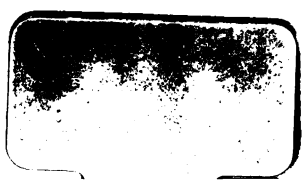

CASES

DETERMINED AT

NISI PRIUS

IN THE

COURT OF KING'S BENCH, &c.

CASES

DETERMINED AT

Nisi Prius,

IN THE

Court of King's Bench,

From the Sittings after EASTER Term 30 GEORGE III.
To the Sittings after MICHAELMAS Term 35 GEORGE III.

BOTH INCLUSIVE.

BY *THOMAS PEAKE*,
OF LINCOLN'S-INN.

Plus habet operis, quam ostentationis. QUINTILIAN.

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PREFACE.

IN the following notes I have endeavoured to unite conciſeneſs with perſpicuity; that I might equally avoid a tireſome and uſeleſs length of ſtatement and an obſcure brevity. In every caſe I have ſtated thoſe circumſtances which appeared to me to affect the queſtion before the Court; where arguments have been urged, I have attempted to report them; and when any portion of the pleadings was neceſſary to elucidate the caſe, of ſuch it has been my endeavour to give a faithful abſtract.

As my deſire was to preſerve to the profeſſion, ſuch caſes *only* as had never yet appeared in print, I have omitted all thoſe in which the ſame points afterwards came before the Court, and have been reported by the Gentlemen who record its deciſions. I have forborne, on the ſame account, to report any of the caſes with which Mr. '*Eſpinaſſe* has lately favoured the profeſſion (three only excepted); and it may naturally be expected that I ſhould aſſign a reaſon for thoſe exceptions.

The cases of *Knibb* v. *Hall*, and of *Smith* v. *Jameson*, as *here* reported, contain *points* not noticed in that Gentleman's reports of those cases; and the case of *Ashley* and *Harrison* was so nicely distinguished from the case of *Tarleton* and *M'Gawley*, which was tried at the same Sittings, that a report of the latter would have been barely intelligible without it.

Understanding that it is the design of Mr. *Espinasse* to continue his Reports, I think it incumbent on me to make an explicit declaration, that I have not any intention of adding a single case to those contained in the present volume; and thus I submit them to the candor of the Profession.

THOMAS PEAKE, Junior.

New Inn, April 1795.

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CASES

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM,

30 GEORGE III. 1790.

BRIDGES one, &c. *v.* FRANCIS.

Saturday, May 22d, 1790. At Westminster.

An agent to a country attorney is not obliged to deliver a bill signed. *Comme ſemble.*

THIS was an action of *aſſumpſit* brought by the Plaintiff for buſineſs done by him as agent for the Defendant, who was a country attorney.

It was objected that the bill was not ſigned.

Lord KENYON ſaid, that ſigning a bill was neceſſary only where it was delivered to the proper client, and not where delivered by the agent to the attorney.

Pigget and *Garrow*, the Defendant's counſel, anſwered that they did not mean to contend that the bill ſhould be ſigned and delivered a month previous to the commencement of the action as directed by the general attorney's act, but that this caſe was within

the act of the 3 *Jac.* 1. *c.* 7. which, after enacting that no attorney, ſolicitor, or *ſervant* to any, ſhould be allowed from his client or *maſter*, for any fee &c. unleſs he has a ticket ſubſcribed &c. further enacts, that "all attornies and ſolicitors ſhall give a true bill "unto their *Maſters* or clients, or their aſſigns, of all "other charges concerning the ſuits which they have "for them ſubſcribed with his own hand and name, "before ſuch time as they or any of them ſhall charge "their clients with any the ſame fees or charges."

Lord KENYON ſaid, he thought there was no weight in the objection, but that if the Defendant deſired it he would ſave the point for the opinion of the Court.

The parties then agreed to refer the bill to the Maſter (*a*).

(*a*) JONES one, &c. *v.* PRICE, *K. B. May* 19, 1748, before *Lee* Ch. Juſtice at *Weſtminſter*.

Caſe for agent's fees.

Mr. *Pratt*, who was Counſel for the Defendant, objected that it was incumbent on the Plaintiff to prove a bill delivered purſuant to the ſtat. of the 3 *Jac.* 1.

Mr. *Hume* and Mr. *Ford*, for the Plaintiff, anſwered, that agents were not within that ſtatute. There was no ſuch thing as an agent when that ſtatute was made, the attornies then came to *London* to ſollicit their own cauſes. No ſettled fees are allowed to agents, nor has the Maſter power to tax their bills but by agreement of the parties.

Lord Ch. Juſtice LEE ſaid, he was not inclined to nonſuit the Plaintiff in this caſe, it not being in his opinion within the ſtatute, but he would reſerve the point to be conſidered, if the Defendant deſired it.

Verdict for the Plaintiff.

Note. It is now uſual to refer an agent's bill to the Maſter for taxation upon the attorney bringing the money into court. *Ex parte Bearcroft*, *Dougl.* 190. in notes.

KENNET and Another, Aſſignees, &c. v. GREENWOLLERS one, &c.

Wednesday, May 26th. At Weſtminſter.

A bankrupt who has not paid 15*s.* in the pound under a ſecond commiſſion cannot be a witneſs for the aſſignees under that commiſſion.

ASSUMPSIT for money had and received. The Plaintiffs called *Tyldeſley* the bankrupt as a witneſs. He was examined on the *voir dire* by the Defendant's counſel, and on ſuch examination it appeared that this was the ſecond time he had become a bankrupt. That under the firſt commiſſion he had paid 16*s.* in the pound, but had not paid any dividend under the ſecond commiſſion, though he had obtained a certificate of his conformity.

Erſkine, for the Plaintiffs, admitted he would not be a competent witneſs without a releaſe, but contended, that when a releaſe was executed by him, he would be an admiſſible witneſs, as much as if only one commiſſion had iſſued.

Lord KENYON. This differs from the caſe of a firſt commiſſion, there the bankrupt can have no intereſt beyond his allowance and ſurplus: but here he is ſwearing to increaſe his eſtate, and by that means to diſcharge his future effects, which remain liable under this ſecond commiſſion, until he pays 15*s.* in the pound. For in a ſecond commiſſion, the certificate does not diſcharge his future effects unleſs he pays that ſum (*a*). This is a plain intereſt in the event of the cauſe, and makes him an incompetent witneſs.

He was therefore rejected, and the Plaintiffs not having any other evidence were nonſuited.

(*a*) 5 *Geo.* 2. *c.* 30. § 9. *Philpot* v. *Cordon*, 5 *T. Rep.* 287. *Haviland* v. *Cook*, *ib.* 655.

CRISTIE *v.* COWELL.

Words actionable *in themſelves* as containing a charge of felony, if ſpoken in reference to a treſpaſs or breach of contract, are not ſo.

THIS was an action for words. The words proved were, "He is a thief, for he has ſtolen "my beer."

It appeared in evidence that the Defendant was a brewer, and that the Plaintiff had lived with him as ſervant; in the courſe of which ſervice he had ſold beer to different cuſtomers of the Defendant, and received money for the ſame, which he had not duly accounted for.

Lord KENYON directed the Jury to conſider whether theſe words were ſpoken in reference to the money received and unaccounted for by the Plaintiff, or whether the Defendant meant that the Plaintiff had actually *ſtolen* beer; for if they referred to the money not accounted for, that being a mere breach of contract, ſo far explained the word "thief" as to make it not actionable. Thus if a man ſays to another "You are a thief, for you ſtole my tree," it is not actionable (*a*), for it ſhews he had a treſpaſs and not a felony in his contemplation.

The Jury found for the Defendant.

(*a*) *Cro. Jac.* 114. *Bull. Niſi Prius*, p. 5.

ROE dem. HENDERSON *v.* CHARNOCK.

Whether a year's notice to quit is neceſſary, when it has been the cuſtom to give that notice. Qu.

EJECTMENT for common field lands, by landlord againſt tenant.

The

The Defendant attempted to ſhew that it was the cuſtom of the country to give a year's notice, to quit, whereas only half a year's notice had been given in the preſent inſtance.

Lord KENYON. I remember there was a cauſe ſome time ago where Lord *Mansfield* ſaid that three months notice is ſufficient under a ſpecial cuſtom: after ſo great an authority it is too much for me, ſitting at *Niſi Prius*, to ſay that under a ſpecial cuſtom twelve months notice is not neceſſary. But there ought to be very ſtrong evidence, and the witneſs muſt not ſpeak to opinion, but facts.

The Defendant failing in his proof the leſſor of the Plaintiff had a verdict. (*a*)

(*a*) *Vide* Mr. Juſtice *Wilmot*'s argument, 3 *Burr.* 1609.

SLACK *v.* BUCHANNAN.

What admiſſions may be given in evidence.

THIS was an action for goods ſold and delivered.

A witneſs was called, who had been an arbitrator between the parties, to prove the admiſſions which had been made by the Defendant when the cauſe was under reference. The reference had proved ineffective.

The Defendant's counſel objected to this evidence, alledging that theſe admiſſions were made by the Defendant in hopes of purchaſing peace, and therefore ought not to be given in evidence againſt him.

Lord KENYON. Hitherto I have made it a rule never to receive any admiſſions whatever, which were made

on a reference that was not effective. I think I have carried that rule too far, and I now wish it to be underſtood, that for the future I ſhall receive evidence of all admiſſions, ſuch as the Defendant would be obliged to make in his anſwer to a bill in equity, and will reject none but ſuch as are merely conceſſions for the purpoſe of making peace, and getting rid of a ſuit. Theſe I think ought not to be admitted in evidence to prejudice the Defendant, when the object for which they were made is at an end (*a*).

(*a*) *Vide Bull. N. P.* 236. accord.

CHARRINGTON *v.* MILNER.

In an action againſt the maker of a promiſſory note the indorſer is a good witneſs to proye it paid.

ASSUMPSIT againſt the maker of a promiſſory note, at the ſuit of the indorſee.

The note was indorſed by one *Monk* to the Plaintiff. The Defendant called *Monk* to prove that he had paid the money for which this note was indorſed to the Plaintiff.

This was objected to on the ground that a man ſhall not be permitted to invalidate his own ſecurity.

Lord KENYON at firſt doubted whether he could be examined or not, but afterwards ſaid that this evidence not proving the note *originally* void, he was clearly a competent witneſs. Wherefore he was examined.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY TERM

30 GEORGE III. 1790.

BARTELOT *v.* HAWKER, Esq.

Saturday, June 26th, 1790. At Westminster.

A husband separated from his wife cannot maintain an action for criminal conversation after the separation.

THIS was an action of trespass for criminal conversation with the Plaintiff's wife.

At the time the adultery was committed the Plaintiff and his wife were separated by articles made on account of quarrels which had previously taken place between them. These articles were dated 31st *May*, 1786.

Lord KENYON said, that if the parties were separated by mutual consent, at the time, he was of opinion that the husband could not maintain this action, for it was impossible he could receive any injury by losing the society of a wife, whom he had already abandoned.

Erſkine, for the Plaintiff, ſaid he believed that he ſhould be able to prove a criminal converſation, or at leaſt a ſeduction of the wife's affections by the Defendant before the ſeparation: but if he ſhould not, he requeſted his Lordſhip to ſave the point for the opinion of the Court, which his Lordſhip agreed to do.

The Plaintiff proved a criminal converſation before the ſeparation, upon which the Jury gave a verdict for the Plaintiff, damages 700 *l.* (*a*)

(*a*) *Vide Hodges* v. *Windham, poſt. Weeden* v. *Timbrel*, 5 *T. Rep.* 357.

Thurſday, July 1ſt. *At Weſtminſter.*

Where to an information in the Exchequer for having run goods knowing them to have been run, the Defendant pleads *not guilty*, ſuch plea only puts in iſſue the fact of Defendant's poſſeſſion and knowledge, and if in ſtating that record, it is ſaid, that the iſſue was *touching and concerning the forfeiture of the goods*, it is a fatal variance.

The KING *v.* RICHARD HAWKINS.

THIS was an indictment for perjury alledged to have been committed on the trial of an information in the Exchequer.

The indictment ſtated, that "at the Sitting of *Niſi* "*Prius* held *&c.* before the Right Honourable Sir "*James Eyre*, Knight, Chief Baron *&c.* a certain "iſſue before then duly joined, in a certain informa- "tion before then exhibited by Sir *Archibald Mac-* "*donald* Knight, Attorney General of our ſaid Lord "the King, who proſecuted, *&c.* between the ſaid "Attorney General, on behalf *&c.* and one *Luke* "*Staveley* (the proſecutor of this indictment) *touching* "*and concerning the forfeiture of certain goods and mer-* "*chandizes imported from parts beyond the ſeas to Great* "*Britain* by way of merchandize and unſhiped to "be laid on land before the cuſtoms and other duties "due

" due to his Majeſty for the ſame goods were firſt " paid and ſecured, *contra formam ſtatuti*, and alſo " touching and concerning the forfeiture of the treble " value of the ſame goods by the ſaid *Luke Staveley*, " for harbouring, keeping, concealing and having poſ- " ſeſſion of the ſame, knowing they were run goods, " *&c.* came on to be tried, *&c.*"

The information in the *Exchequer* was read. It ſtated, that " certain merchants unknown did im- " port, or cauſe *&c.* from parts beyond the ſeas into " *Great Britain*, to wit at, *&c.* within the port of " *London*, in a certain ſhip or veſſel likewiſe unknown, " by way of merchandize, two bales of *Bandannoa* " handkerchiefs, of the value *&c.* liable at the time " of the importation thereof to the payment of cuſ- " toms and other duties; that they did afterwards un- " ſhip them to be laid on land, before the cuſtoms " *&c.* were paid, *&c.* by reaſon whereof they became " forfeited, and being ſo forfeited, they came to the " hands and poſſeſſion of the ſaid *L. S.* he at the ſaid " time well knowing that they were imported and " unſhiped *&c.* by reaſon whereof *he forfeited the* " *ſaid goods and merchandizes*, and 360 *l.* the treble " value thereof. There was a ſecond count gene- " rally ſtating that the goods had been run into *Great* " *Britain* &c. by reaſon whereof they became for- " feited, and that the Defendant did knowingly con- " ceal them *&c.* whereby he forfeited 360 *l.* the " treble value of the ſaid goods." The proſecutor of this indictment had pleaded generally " not " guilty" to that information, and upon the trial a verdict was found againſt him for the penalty.

Erſkine,

Erſkine, for the Defendant in this indictment, objected that the iſſue on the information was not truly ſtated in this record, for that the plea of not guilty did not put in iſſue the fact of the goods being brought over by perſons and in ſhips unknown, but only the Defendant's knowledge of their having been run. To recover the goods themſelves on account of a forfeiture, the proceedings muſt be *in rem*.

Mingay, for the proſecution, anſwered, that the iſſue was truly ſtated, becauſe in order to recover a verdict on that information, the Attorney General muſt have proved that the goods were forfeited, as well as the Defendant's poſſeſſion of them and knowledge of their being ſmuggled.

Buller J. (*a*) Though the Attorney General might, as Mr. *Mingay* obſerves, be obliged to prove the firſt part of the charge, either by witneſſes, or a judgment on a prior information *in rem*, yet it does not follow that that was the matter in iſſue. It is only inducement. The only queſtion put *in iſſue* by the plea of not guilty was, whether the Defendant had the goods in his cuſtody knowing that they were ſmuggled into *England*.

His Lordſhip therefore directed an acquittal, which was found without entering into the merits.

(*a*) Mr. J. Buller ſat to day for Lord Kenyon.

The KING *v.* TAYLOR.

Same day.

THE Defendant was indicted for conſpiring with one *Peverel* and *Humphrey Triſtram Potter* deceaſed, to ruin the credit of the proſecutors Meſſrs. *Parker* (who were conſiderable glaſs warehouſemen) and in proſecution of ſuch conſpiracy, publiſhing a libel in the newſpaper called the *Morning Star*, purporting to be an advertiſement for calling together the creditors of the ſaid *Parkers*. The indictment contained a ſecond count for publiſhing the libel.

The proper queſtion to be aſked a witneſs in order to ground an objection to his competency, is not whether he believes in *Jeſus Chriſt* or the Holy Goſpels, but whether he believes in *God* and a future ſtate.

The proſecutors called a witneſs of the name of *Smith*. Before he was examined, *Mingay* the Defendant's counſel, aſked him whether he believed in *Jeſus Chriſt?* But, on *Erſkine*, for the proſecutor, objecting to the queſtion, *Buller* J. over-ruled it, ſaying it ſhould not be put.

Mingay then aſked the witneſs, whether he believed in the *Holy Goſpels of God*, on which he had been ſworn? He anſwered, he believed them, as far as he could underſtand them.

Mingay inſiſted this was no anſwer to his queſtion, and was proceeding in his examination, when

BULLER J. ſaid, that this was not the proper queſtion, and aſked him whether he believed in *God*, the obligation of an oath, and a future ſtate of rewards and puniſhments? and on his anſwering in the affirmative he was admitted.

Several perſons were called to affect the character of this witneſs, and ſwore that, from what they obſerved of his converſation and manners, they would not believe him on his oath—And the Jury, not believing his teſtimony, found the Defendant not guilty.

Saturday, July 13th. *At Weſtminſter.*

The perſon who has been charged with a ſum of money by the perjury of the *only witneſs* examined, and has filed a bill for relief, is not a competent witneſs on an indictment for that perjury, though he has ſince paid the money.

The KING *v.* DALBY.

THIS was an indictment againſt the Defendant for perjury alledged to have been committed on the trial of an action brought by *Abraham Greenwood* againſt the proſecutor for uſury; in which action a verdict was obtained againſt the proſecutor on the evidence of the Defendant *who was the only witneſs*. The firſt witneſs called was *Prieſtman* the proſecutor.

Law, for the Defendant, objected to him as an incompetent witneſs on account of his intereſt. He had filed a bill in the Court of Chancery againſt the Defendant and *Greenwood*, ſtating the perjury and that the verdict was obtained on that perjury, and praying an injunction. He ſaid this caſe was ſimilar to that of *The King* v. *Menetonè* at the Sittings after Trinity Term 1785. That was an indictment for perjury committed in an anſwer in Chancery to an injunction bill filed by the proſecutor. Mr. J. *Buller*, who tried that cauſe, thought that the proſecutor was an incompetent witneſs, becauſe by convicting the Defendant of perjury, the witneſs would certainly obtain a perpetual injunction.

Erſkine ſaid, he was counſel for the Defendant in that caſe, and perfectly recollected it. This caſe, he ſaid, materially differed from it, for to this bill the Defendant had demurred; and, as to him, the bill was diſmiſſed with coſts, and ſince that time *the money had been paid* by the proſecutor.

Lord KENYON. This witneſs is certainly not competent to give evidence in this cauſe; as he is clearly intereſted

intereſted in and may derive a benefit from the event of it, for ſhould this Defendant be convicted, he being the only witneſs to ſupport the verdict, the Court of Chancery, upon having this new matter ſtated in a new or ſupplemental bill, would order the money to refunded.

He was therefore rejected, and the proſecutor not having an office copy of the proceedings in the former cauſe the Defendant was acquitted (*a*).

(*a*) The caſes on this point are very contradictory. In *Watts*'s caſe, *Hardr.* 331. it is laid down as a general rule, that in the caſe of perjury he who is injured by the perjury cannot be a witneſs; and in the caſe of The *King* v. *Whiting*, 1 *Salk.* 283. it was held, that a woman who had been induced by the fraud of the Defendant to ſign a note of hand, could not be a witneſs againſt him, becauſe his conviction would *influence* the Jury on the trial of an action on the note, though *the record could not be given in evidence*. In the caſe of The *King* v. *Ellis*, 2 *Stra.* 1104. a Defendant in an ejectment was held not to be a witneſs on an indictment for perjury committed on the trial of ſuch ejectment: and in the caſe of The *King* v. *Nunez*, 2 *Stra.* 1043. it was determined, that a perſon who had filed an injunction bill in the Exchequer to ſtay proceedings in an action brought on a promiſſory note could not be a witneſs to prove perjury committed in an anſwer to that bill. *Paris*'s caſe, (1 *Ventr.* 49. and 1 *Sid.* 431.) is directly contrary to The *King* v. *Whiting*; the only difference between the two caſes is, that one information was for fraudulently procuring a warrant of attorney to confeſs judgment, the other for ſo procuring a promiſſory note. And in The *King* v. *Moiſe*, (1 *Stra.* 595.) which was an indictment for tearing a note, the payee of the note was admitted to prove the caſe. The caſes of The *King* v. *Whiting*, The *King* v. *Nunez*, and The *King* v. *Ellis*, are ſaid by Lord *Mansfield*, in 4 *Burr.* 2255. to have been overruled by Lord Ch. J. *Lee* in the caſe of The *King* v. *Broughton*, 2 *Stra.* 1229. and the rule laid down by Lord *Mansfield* in that book is, "that the queſtion in a "criminal proſecution being the "ſame with a civil cauſe in "which

" which the witneſs is intereſted, " goes *generally* to the credit: " *unleſs the judgment in the proſe-* " *cution, where he is a witneſs,* " *can be given in evidence in the* " *cauſe where he is intereſted.*" A diſtinction however may be made between the caſes of The *King* v. *Whiting*, &c. and the caſe of The *King* v. *Broughton*, in the firſt three caſes the perſon who was called as a witneſs might eventually have been benefitted, becauſe in The *King* againſt *Whiting* the note was a good inſtrument till the Defendant was convicted. In the *King* v. *Ellis*, for aught appears to the contrary, the Defendant in the ejectment failed at the trial, and he might hope to obtain a verdict in another ejectment if he ſucceeded in convicting the Defendant on the indictment for perjury, and in The *King* v. *Nunez* the ſuit in the Exchequer was ſtill pending. In the caſe of The *King* v. *Broughton* the ſuit in Chancery was ended, and ended in the manner moſt agreeable to the intereſt of the witneſs, for the Chancellor not believing *Broughton* the Defendant in that indictment, had decreed for the witneſs, ſo that the witneſs could not have even the hope of benefitting himſelf by convicting *Broughton*. The caſe of The *King* v. *D' Faria*, *poſt*. is open to the ſame obſervation, and the following caſe clearly eſtabliſhes the poſition laid down by Lord *Mansfield* in the caſe of *Abrahams* and *Bunn*. This however clearly overturns the caſe of The *King* v. *Whiting*, and cannot be diſtinguiſhed from it. It was the caſe of *Bartlet* v. *Pickerſgill*, and is cited by Lord *Mansfield*, 4 *Burr*. 2255. as follows: The Defendant bought an eſtate for the Plaintiff. There was no writing, nor was any part of the money paid by the Plaintiff. The Defendant articled in his own name and refuſed to convey, and by his anſwer denied any truſt. Parol evidence was rejected. And the bill was diſmiſſed. The Defendant was afterwards indicted for perjury, tried at *York*, and convicted, *on the evidence of the plaintiff*, confirmed by circumſtances and the Defendant's declarations. The plaintiff then petitioned for a ſupplemental bill in the nature of a bill of review, ſtating the conviction. But the petition was diſmiſſed *becauſe the conviction was not evidence.*

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM

32 GEORGE III. 1790.

MIDDLETON *v.* BREWER.

Friday, December 3d, 1790. At Weſtminſter.

A promiſe to pay the debt of another need not be proved to be in writing when the Defendant pleads a tender to the count on ſuch promiſe.

ASSUMPSIT. The declaration ſtated, that the Defendant's ſon being indebted to the Plaintiff in a large ſum of money, in conſideration of the Plaintiff's forbearing to ſue him for the ſame. Defendant promiſed to pay.

The Defendant pleaded the general iſſue to part, and a tender of the reſidue. The queſtion was, whether the Plaintiff was obliged to prove an undertaking in writing.

Lord KENYON was clearly of opinion that he was not. By paying the money into Court on the plea of tender the Defendant had admitted the promiſe; this was not as if there had been ſeveral counts, and the Defendant

Defendant had pleaded the tender and paid the money into Court on ſome counts only; he had applied this tender to this count, and therefore the Plaintiff was not obliged to prove the promiſe.

It appearing that more than ſufficient to ſatisfy all juſt demands of the Plaintiff had been tendered, the Jury found a verdict for the Defendant.

THWAITES *v.* RICHARDSON.

In an action of aſſumpſit againſt one partner, evidence may be given of the admiſſion of another. Comme ſemble.

THIS was an action for money paid laid out and expended, *&c.*

The Defendant was one of the proprietors of a public newſpaper called the *Morning Star.* The Plaintiff had expended ſeveral ſums of money in paying the workmen employed in printing the paper *&c.*

After proving the Defendant a partner in the paper, the Plaintiff offered to give evidence of the admiſſion of another partner that the money was owing to the Plaintiff.

On this evidence being objected to, Lord KENYON ſaid he thought that though in caſes where an action is brought againſt ſeveral partners, the admiſſion of any one might be given in evidence to prove all liable, yet when one only was ſued, the admiſſion of the other could not be given in evidence to charge him.

It was then propoſed to releaſe the other partner and call him, but the Plaintiff's counſel recollecting that by ſo doing they would diſcharge both, did not call him; and upon *Garrow*, for the Plaintiff, obſerving that

that there was a caſe (*a*) in one of the books, where it had been held that the admiſſion of one joint maker of a promiſſory note might be given in evidence to take it out of the Statute of Limitations in an action brought againſt the other alone.

Lord KENYON ſaid, he would receive the evidence with liberty for the Defendant to move the Court upon the queſtion as to its admiſſibility.

The parties afterwards agreed to a reference.

(*a*) *Whitcomb* v. *Whiting*, *Dougl.* 629.

GANER *v.* Lady LANESBOROUGH.

Monday Dec. 6.

On a replication that *A.* was not married to *B.* proof that *A.* was married to another woman then alive, and therefore that he was incapable of contracting marriage, will maintain the iſſue.

DEBT on judgment.

The Defendant pleaded in abatement that ſhe was covert of *John King*, and the Plaintiff, by his replication, traverſed that plea. The Defendant proved her marriage to *King*; in anſwer to which the Plaintiff proved the marriage of *King* with a former wife, and that ſhe was ſtill living. This evidence was objected to as incompetent for the Plaintiff to give on this replication, which only traverſed the marriage of *King* with the Defendant. But Lord *Kenyon* admitted it, ſaying, it proved that there was no marriage at all between the Defendant and *King*, he being unable to contract marriage with her.

The Defendant then offered to prove that *King* being a Jew and his former wife a Jeweſs, they were divorced at *Leghorn*, according to the rites and cuſtoms of the Jews there, and that after ſuch divorce it was competent to either party to marry again.

The Engliſh Courts cannot take notice of any judicial act done in a foreign country, without evidence of the laws of ſuch country.

To prove this ſhe produced an inſtrument under the ſeal of the Synagogue there, whereby they were divorced from each other. But Lord *Kenyon* held this to be no evidence, for before he could take notice of any proceeding in a foreign court, he muſt know the law of the country, which was matter of evidence, and ſhould be proved by witneſſes. (*a*)

A Jeweſs may be permitted to give parol evidence of her own divorce in a foreign country according to the cuſtom of the Jews there.

The Defendant then called *King*'s former wife to prove the divorce. She was objected to as an incompetent witneſs, but the objection being over-ruled, ſhe ſwore (without producing any inſtrument), that ſhe was divorced from *King* before the *Rabbi*, at *Legborn* according to the ceremony and cuſtom of the *Jews* there.

On this evidence the Defendant had a verdict.

(*a*) *Vide* 1 P. W. 431, accord.

Wedneſday, Dec. 9.

POLLARD *v.* SCOTT.

It is no objection to the competency of a witneſs who comes to prove a highway that he is the owner of an adjoining piece of land, and has let a road to *A.* at a certain ſum of money *per annum*, which he cannot uſe unleſs the road in diſpute is eſtabliſhed.

TRESPASS. Juſtification, the *locus in quo* being a highway.

A witneſs was called on behalf of the Defendant to prove his plea. He was aſked, on the *voire dire*, whether he was not the owner of a field adjoining the *locus in quo*, and had not agreed with the Defendant to let him paſs acroſs that field at all times, he paying 6 *l.* a year for that privilege. He anſwered in the affirmative, and it appeared that the Defendant could not get to the road aſſigned by the witneſs, if the *locus in quo* were not a public road.

Erſkine

Erſkine contended that this was ſuch an intereſt in the event of the ſuit as rendered him an incompetent witneſs, but Lord *Kenyon* over-ruled the objection, and he was examined.

A copper-plate map was produced, wherein this cloſe was deſcribed as a public road; and the Plaintiff offered evidence to prove that it was generally received in the pariſh as an authentic map. It purported on the face of it to be taken by the direction of the churchwardens of that time.

A copper-plate map taken by the direction of the overſeers of a pariſh is no evidence on an iſſue whether a particular ſpot of ground is a high-way or not.

Lord KENYON refuſed to receive this evidence, ſaying, that it would be equally improper to admit it as to admit a plan taken by the Lord of a manor, who might thereby cruſh and deſtroy the eſtates of his tenants. (*a*)

(*a*) *Vide Sir John Bridgman* v. *Jennings*, 1 *Lord Raym.* 734.

KOOPES *v.* CHAPMAN and Another.

A creditor is a witneſs to prove an act of bankruptcy if he releaſes to the aſſignees.

THIS was an action of trover. A commiſſion of bankrupt had iſſued againſt the Plaintiff, and the Defendants had ſeized the goods thereunder.

The Defendants admitted that they had ſeized the goods, and to prove that the Plaintiff had committed an act of bankruptcy *they* called a creditor who had releaſed to the aſſignees.

Mingay, for the Plaintiff, objected that this releaſe would not make him a competent witneſs. At preſent it did not appear that the aſſignees had any intereſt in the eſtate of the Plaintiff, and therefore they could not take a releaſe.

Lord KENYON. This makes him a good witneſs to prove the bankruptcy. If the commiſſion is eſtabliſhed the releaſe ſtands good; if not, the Plaintiff is not releaſed, nor has it any operation.

Friday, Dec. 11. at *Guildhall.*

MACFERSON *v.* THOYTES.

Compariſon of hands is not evidence in civil any more than in criminal caſes.

ASSUMPSIT on a bill of exchange, indorſee againſt acceptor, the bill was drawn by one *Parry* payable to his own order, and the name of *Parry* was indorſed on it.

The Plaintiff proved the hand writing of all the indorſers, except the firſt.

The Defendant's counſel inſiſted that this ſhould alſo be proved.

It was anſwered, that the acceptance was an admiſſion of the hand-writing of the drawer; and that by comparing that hand-writing with the *indorſement*, they would be found to correſpond.

Lord KENYON. Compariſon of hands is no evidence. If it were ſo, the ſituation of a jury who could neither write nor read would be a ſtrange one, for it is impoſſible for ſuch a jury to compare the hand-writing.

The Plaintiff was therefore called. (*a*)

Vide Strange v. *Sea'e, Eſpinaſſe* 14, accord'.

(*a*) BROOKBAND *v.* WOODLEY clerk, Coram *Yates* Juſt. at *Worceſter* Spring Aſſizes, 1770.

In prohibition, the Plaintiff in ſupport of a *modus*, produced in evidence a paper ſaid to be under the hand of the deceaſed

ceaſed Rector, being a particular of tithes, &c. In order to ſhew that this was the writing of the deceaſed Rector whoſe name it bore, the Plaintiff's counſel offered to produce many of the returns to the Spiritual Courts of births and burials made in the time of that Rector, and ſigned with his name; and upon comparing this entry with thoſe returns, it was ſaid it would appear, that the hand-writing was the ſame. The Rector had been dead many years.

YATES J. I have no doubt to reject this evidence as not admiſſible, I do not know any caſe where compariſon of hands has been allowed to be evidence at all. No trial can be decided by opinion and ſpeculation, but by evidence, where a witneſs has ſeen the party write and ſpeaks to his belief, of that writing which is produced in evidence, bring the party's hand-writing, that is evidence. But where it is merely opinion on ſimilitude of the writing collected from barely comparing them, the jury may compare them as well as any body elſe, and any two people may think differently. In an indictment for forgery, the evidence of a perſon who has ſeen the party write is ſufficient. The caſe now in queſtion is not like a rental, terrier, old title deeds; theſe are received without evidence of hand-writing, becauſe of the *place* they come from, which gives them authenticity. Suppoſe ſome of the jury cannot read or write, how are they to judge of the ſimilitude of hands. I have no doubt but this evidence muſt be rejected.

EVANS *v.* SILVERLOCK.

ASSUMPSIT for goods ſold and delivered. The Defendant's counſel ſtated that the Plaintiff and one *Morgan* were in partnerſhip together, and that on a diſſolution of that partnerſhip it was agreed between them, that *Evans* ſhould receive ſome of the debts, and *Morgan* the others.

In an action brought by a partner, another may be called to prove the debt paid to him.

others. This debt was to be paid to *Morgan* and the Defendant had accordingly paid it to him. They called *Morgan* to prove this caſe.

Bearcroft objected that he was not a competent witneſs.

Lord KENYON ſaid, he was, as the judgment in this cauſe would not conclude his right. He was examined, and on his evidence the Defendant obtained verdict.

Monday, Dec. 13. at *Guildhall.*

CHARLTER One, &c. v. BARRET.

Words ſpoken at different times may be given in evidence on one count.

CASE for words ſpoken of Plaintiff in his profeſſion of an attorney.

There was but one count to which the words applied, and the plaintiff gave evidence of the ſame words ſpoken at different times.

This was objected to by the Defendant's counſel.

Lord KENYON ſaid, that though theſe words were ſpoken at different times, they might be given in evidence on this one count to ſhew the malice of the Defendant. (*a*)

(*a*) *Vide Mead* v. *Daubigny*, poſt, and *Lee* v. *Huſſ* poſt.

MEE *v.* REID.

ASSUMPSIT on a bill of exchange.

The Plaintiff's caſe being proved, the Defendant called a witneſs, who was a *Scotchman* and a member of the kirk; he refuſed to kiſs the book, and inſiſted on holding up his hand.

A member of the kirk of *Scotland* may be ſworn without kiſſing the book.

An objection was made to this mode of adminiſtering the oath, and Lord *Kenyon* was at firſt inclined not to permit him to be ſworn in this form, but at length determined to receive his evidence under the ſanction of an oath ſo adminiſtered.

Accordingly he held up his right hand and repeated the oath after the crier. (*a*)

(*a*) *Vide Leach's Crown Caſes* 348, *Mildrone's* caſe.

FASSET and Another *v.* BROWN.

Tueſday, Dec. 14.

DEBT on a bond entered into by the Defendants as ſureties for *George Ruſſell* clerk to the Plaintiffs.

If the name of a fictitious perſon is put as a ſubſcribing witneſs to a deed, proof of the Party's hand writing is ſufficient.

The Defendant pleaded *non eſt factum*, and that *Ruſſel* had duly accounted.

The Plaintiffs proved that the Defendant brought the bond to the Plaintiff's counting houſe ſubſcribed with two names as witneſſes to the execution of the bond by him: That on enquiry it appeared that no ſuch perſons as thoſe whoſe names were ſubſcribed as witneſſes were in exiſtence.

Lord KENYON then ſaid, that the Plaintiff was at liberty to give evidence of the Defendant's hand-writing, and the bond was ſo proved.

But there being a variance between the date of the bond and the ſtatement of it in the declaration, the Plaintiffs were nonſuited. (*a*)

(*a*) *Vide Grellier* v. *Neale and Others*, poſt.

SCHOLEY *v.* WALSBY.

An acknowledgment of having received the acceptance of a bill of exchange is a receipt for money within the 23 *G.* 3. and liable to the ſtamp duty impoſed by that act on ſuch receipt.

ASSUMPSIT on a bill of exchange drawn by the Plaintiff on the Defendant, and accepted by him.

The Defendant pleaded a ſet-off for money paid by him to the Plaintiff's uſe, money had and received by the Plaintiff for his uſe, and for money lent by him to the Plaintiff.

In ſupport of his caſe he offered to read in evidence a paper ſigned by the Plaintiff written in the following words.

" *London, Decem.* 22d, 1789. Received of Mr. " *Walſby, his acceptances* for 200 *l.* due *Feb.* 20th, " 25 *l.* out of which Mr. *Walſby* has my acceptance " for, 40 *l.* the difference I am to make up by the " ſaid time of payment.

" 60 *l.* on one for 25th of *February.*

" 140 *l.* I promiſe to provide.

" 200 *l.* *Wm. Scholey.*"

This

This was objected to as no evidence, not being ſtamped. The Plaintiff's counſel contended it ought to be ſtamped either as a receipt or a promiſſory note for 140*l.*

Lord KENYON was of opinion it ought to have been ſtamped as a receipt, for if ſuch a paper as this were to be admitted as evidence without a ſtamp, it would put it in the power of any perſon to evade the act of parliament in almoſt every caſe, by paying in notes or bills.

The Plaintiff produced the bill, which had a receipt on the back of it as being paid to a perſon who was at that time the holder of it.

Lord KENYON. *Prima facie* the receipt on the back, imports that it was paid by the *acceptor*: for aught I know to the contrary the Plaintiff and Defendant may have ſince ſettled their accounts, and this bill may have been delivered up on ſuch ſettlement. It muſt therefore be explained before I can receive it as evidence of the bill having been paid by the drawer.

A general receipt on the back of a bill of exchange is *prima facie* evidence of its having been paid by the *acceptor*, and will not of itſelf be evidence of a payment by the *drawer* though it is produced by him.

The Plaintiff, not having any witneſs to prove that the bill had been paid by him, was nonſuited.

THORNTON *v.* The ROYAL EXCHANGE ASSURANCE COMPANY,

Wedneſday, Dec. 15.

THIS was an action of covenant on a policy of aſſurance on a ſhip from the *Grenades* to *London*.

A ſhip builder may be called as a witneſs to give his opinion as to the ſeaworthineſs of a ſhip, on the facts ſtated by others.

The

The ſhip ſtruck upon the bar, as ſhe was entering *Grenville Bay*, and received an injury thereby, for which the preſent action was brought.

She was afterwards ſurveyed and repaired. The Defendant contended ſhe was not ſea-worthy; and offered to call Mr. *Meſtair* an eminent ſhip builder, to prove that from what appeared on the ſurvey which had been made, but at which he was not preſent, it was impoſſible *in his opinion*, that the ſhip could be ſea-worthy when the policy was effected.

Erſkine for the Plaintiff objected to this evidence. He ſaid that had the perſons who made the ſurvey been called, he ſhould object to any queſtion as to their opinion; the objection againſt this evidence was much ſtronger; the ſurveyors are not obliged to ſtate on their ſurvey all the circumſtances on which they ground their opinion, and the witneſs can only judge from what is contained in the ſurvey.

Lord KENYON. This evidence is certainly admiſſible. Lord *Hardwicke* uſed often to be aſſiſted by the Brethren of the Trinity Houſe, in cauſes of this nature.

The Defendants not making out their caſe, the Plaintiff had a verdict. (*a*)

(*a*) *Vide Chaurand and Another* v. *Angerſtein*, poſt.

ROBERTS and Others Aſſignees, &c. *v.* TEASDALE.

TROVER for Cotton.

The Plaintiffs were aſſignees under a joint commiſſion againſt *Cook* and *Kilner*, and having proved the trading, act of bankruptcy, *&c.* Mr. *Crowder* the Solicitor under the commiſſion was called to prove the aſſignment to the Plaintiffs. On his croſs examination he ſaid, that there having been two meetings of the bankrupt's creditors, and they being found inſolvent; the bankrupt *Kilner* called on him to aſk him what was beſt to be done. He told *Kilner* that the moſt adviſeable thing he could do was to commit an act of bankruptcy by denying himſelf to a creditor, which he accordingly did. He added, that this advice was given without the knowledge of the petitioning creditors, or any deſire from them, though they had before deſired him to take out a commiſſion.

Though a trader deny himſelf for the expreſs purpoſe of becoming a bankrupt, ſuch denial will amount to an act of bankruptcy, if made without the knowledge of, or any previous concert with the petitioning creditor.

The Defendant's counſel contended, that this was ſuch a concerted act of bankruptcy, as would not ſupport a commiſſion.

Lord KENYON. The diſtinction in theſe caſes is very nice. It does not appear that there was any intention to commit a fraud in this caſe, either by the bankrupt or the petitioning creditor. In this reſpect it differs from thoſe caſes in which concerted acts of bankruptcy have been held to be fraudulent, and the commiſſion grounded upon them void. Here was a deſire to make an equal diſtribution of the bankrupt's effects, and the advice was the moſt beneficial which could

could have been given for all parties. His Lordſhip however added, that he was not entirely free from doubt on the caſe.

The Defendant's counſel purſued their croſs examination, and Mr. *Crowder* ſaid, that at the meetings, an aſſignment for the benefit of the creditors was offered, but the creditors inſiſted on having a commiſſion taken out.

Lord KENYON thought that this circumſtance materially altered the caſe, but wiſhed the jury to find a verdict for the Plaintiff, ſubject to the opinion of the Court on this point.

The jury found for the *Defendant*.

In the following term a motion was made for a new trial, and after hearing counſel on both ſides, the court made the rule abſolute.

On that occaſion both Lord *Kenyon* and Mr. J. *Buller* ſaid that they thought the evidence of Mr. *Crowder* did not prove this to have been a concerted act of bankruptcy. His evidence is poſitive that he had no communication with the creditors on that ſubject. He gave the advice to the bankrupt as a friend to him, and to the creditors in general, and not for the purpoſe of making a fraudulent bankruptcy. It was an honeſt advice and for the benefit of all parties.

GROSE J. The evidence of Mr. *Crowder* is that this advice was given entirely from himſelf, without any deſire of the creditors, or even their knowledge. It is ridiculous to ſay that it is a *concerted* act of bankruptcy. (*a*)

(*a*) *Vide Hooper* v. *Smith*, 1 *Black. Rep.* 441. *Bromley* v. *Mundee*, *Bull. N. P.* 39. *Cawley and Another* v. *Hopkins*, *Co. Bank. L.* 102. *Eyre and Another Aſſignees* v. *Birbeck and Another*, 2 *Term Rep.* 525. n. (*a*).

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM,

31 GEORGE III. 1791.

SHAW *v.* WHITEMAN.

Thurſday, Feb. 17th, 1791, *At Weſtminſter.*

In an action of *aſſumpſit* on an expreſs promiſe to pay for the maintenance of a baſtard child, of which the Defendant was the putative father, it is no defence that he has ſince diſcovered that the child was not begotten by him.

INDEBITATUS aſſumpſit for board *&c.* found and provided by the Plaintiff for a child at Defendant's requeſt.

The Plaintiff proved that ſhe being delivered of the child for whoſe maintenance the action was brought, and the Defendant believing the child to be his, agreed that ſhe ſhould provide all neceſſaries for the child, and that he would pay her 7*s.* a week. The Defendant continued to pay that money until the month of *Auguſt* 1788, when he refuſed to pay any further allowance whatever. The Plaintiff had not ſworn the child to the Defendant before a magiſtrate.

The

The Defendant admitted the caſe proved by the Plaintiff, but offered to prove, that the reaſon of his refuſal to pay the allowance, was that he had diſcovered that the child was not his, but that one *Farrer*, with whom the Plaintiff had alſo been connected, was the father of it. His counſel contended that by proving this fact they ſhould ſhew there was no conſideration for the promiſe, and that it was therefore void.

Lord KENYON was of opinion that this evidence could not be received on the preſent iſſue. The Jury could not here try who was the father of this child, but muſt confine themſelves to the contract. If the child was not the Defendant's he might relieve himſelf by applying to a magiſtrate for an order of filiation. Under this direction the Jury gave a verdict for the Plaintiff.

On *Saturday* the 14th of *May*, in the following Term, *Mingay* moved for a new trial, but the Court refuſed even a rule to ſhew cauſe.

BRETON *v.* COPE, Executor.

Parol evidence cannot be given of the tranſfer of ſtock, but copies from the books of the Bank muſt proved.

DEBT on a bond of the Defendant's grandmother (who was the Plaintiff's mother) conditioned for the payment of 1000 *l.* and intereſt.

Pleas *non eſt factum*, *ſolvit ad diem*, and *ſolvit poſt diem*.

The Defendant called a broker to prove that he, as the broker of the teſtatrix, had tranſferred 20,000 *l.* ſtock to the Plaintiff.

Lord

Lord KENYON. This is not admiſſible evidence, to prove the transfer, copies from the books of the Bank ſhould be proved.

The Defendant then offered to prove this fact by the production of a deed whereby the Plaintiff aſſigned the dividends of the ſtock to the teſtatrix for her life; the aſſignment to him was recited in this deed. The ſubſcribing witneſs was not in court, but the deed having been cancelled, *Erſkine*, for the Defendant contended that any other perſon might be permitted to prove it as well as the ſubſcribing witneſs, becauſe all its force and power as a legal inſtrument was at an end, and it was only produced as evidence of the Plaintiff's admiſſion of a fact.

An inſtrument executed in the preſence of a ſubſcribing witneſs cannot be proved by any other perſon, even after it is cancelled.

Lord KENYON was clearly of opinion it could not be read unleſs proved by the ſubſcribing witneſs.

The Defendant then proved an acknowledgment of the Plaintiff that he had received this money.

Mingay for the Plaintiff contended that this evidence did not ſupport either of the pleas of payment, unleſs it was expreſsly ſhewn that the ſtock was tranſferred for the purpoſe of ſatisfying this debt, but Lord *Kenyon* being clearly of a contrary opinion, the Plaintiff proved that the 20,000 *l.* ſtock was intended by the teſtatrix as a gift to him.

A transfer of ſtock is evidence on a plea of payment to an action on a bond.

Lord KENYON. It has been a thouſand times decided that where a debtor gives a legacy to his creditor, it ſhall be conſidered as payment of the debt. And the gift of 20,000 *l.* ſtock was ſurely a good payment of a debt of 1000 *l.*

The Defendant had a verdict.

Tueſday, Feb. 22d. *At Weſtminſter.*

A man who has been in fact married, may be a witneſs to prove ſuch marriage illegal.

STANDEN *v.* STANDEN and Others (*a*).

CHARLES Miller, by his will, gave a ſum of 200 *l.* to *Charles Miller Standen* and *Caroline Elizabeth Standen* (two of the Defendants), to bind them out apprentices. The reſt of his fortune he gave and bequeathed "to the legitimate children of "*Charles Standen*," father of the Defendants.

A bill was filed in the Court of Chancery by the Defendants againſt the executors of *Charles Miller*'s will; and upon the hearing of the cauſe the Lord Chancellor directed this iſſue to try whether the Plaintiff was the lawful iſſue of *Charles Standen*.

The Plaintiff called his mother, who proved that ſhe was married to *Charles Standen* the father, on the 4th of *Auguſt*, 1755, at the chapel of the *Savoy*. That they cohabited together, and that the Plaintiff was born in that wedlock. That having lived five years together, they parted, and had not cohabited ſince.

The Plaintiff alſo proved the regiſter of the marriage, where it was entered, that the marriage was celebrated by banns; but no witneſs's name appeared. In anſwer to a queſtion, whether any banns were publiſhed, the mother ſaid ſhe had no other knowledge of the fact than having been told ſo by *Charles Standen* (*b*).

(*a*) This cauſe was firſt tried at the Sittings after *Eaſter* Term 1789.

(*b*) It is not neceſſary for the party who wiſhes to eſtabliſh the marriage to prove the publication of banns. *Rex* v. *St. Deveraux*, *Burr.* S. C. No. 162. 1 *Blac.* 367. S. C. *Vide* alſo *Wilkinſon* v. *Payne*, 4 *Term Rep.* 468.

The

The Plaintiff alſo called a witneſs to prove that he had been told by the clerk (ſince deceaſed) that the banns were duly publiſhed.

Lord KENYON ſaid that this might be received as evidence of the general reputation, though not of the particular fact.

The Plaintiff then proved ſome circumſtances to corroborate the marriage, ſuch as *Charles Standen* having demanded the firſt witneſs as his wife, when her relations kept her from him, *&c.*

The Plaintiff having cloſed his caſe, the Defendants called *Charles Standen* the father.

Erſkine aſked him, whether the marriage ceremony was not in fact performed at the *Savoy* chapel; whether they both conſented to the celebration of that marriage, and lived together as man and wife in conſequence of it; and whether the Plaintiff was not his child by the woman he had ſo married. He anſwered in the affirmative. Whereupon *Erſkine* objected that having acknowledged that a marriage ceremony had taken place, and that a cohabitation had alſo taken place under the ſanction of it; he ought not to be permitted to prove that the ceremony was a mere farce, contrary to the obligation he had ſolemnly entered into at the altar.

But Lord *Kenyon* thinking the objection did not go to his competency though it would much affect his credit, he was examined.

He ſwore that the banns were not duly publiſhed three times. Being aſked the reaſon of their not having been ſo publiſhed, he ſaid that he had been

told by *Wilkinſon*, the clergyman, that a friend of the wife's forbade them the ſecond time they were publiſhed.

On this being objected to, Lord *Kenyon* ſaid it was not admiſſible as a fact, but as evidence that *Wilkinſon* had confeſſed he had married without banns.

The ſubſequent marriage of *Charles Standen* was alſo proved, and that the Defendants were the iſſue of ſuch ſecond marriage.

The form of words preſcribed by the Rubrick for the publication of banns need not be preciſely followed, this part of the act of parliament being merely directory.

Lord KENYON. In order to conſtitute a legal marriage by banns, they muſt be three times publiſhed on three ſeveral days. All the directions of the act of parliament (*a*) need not be complied with, the form preſcribed by the act is merely directory, and need not be ſtrictly followed (*b*). If the ſubſtance is followed it is ſufficient. If the entry in the regiſter was not truly ſtated, the clergyman was guilty of felony, and he put himſelf in a dangerous ſituation by making ſuch a confeſſion as that ſtated by the witneſs *Charles Standen*. His Lordſhip made ſome further comments on the evidence of *Charles Standen*, and left the cauſe to the Jury on the credit they thought proper to give to him.

The Jury found for the Plaintiff.

(*a*) 26 *Geo.* 2. *c.* 33. (*b*) *Vide Reed* v. *Paſſer* and Others, *poſt*.

LICET and Another, Aſſignees &c. v. REID Eſq. and Another.

Wedneſday, Feb. 23d. At Weſtminſter.

TROVER for goods.

Loy the bankrupt, became acquainted with a woman and cohabited with her as her huſband for ſome time, when they parted: and ſhe being abſent from the houſe in which they lived, he took the goods in queſtion out of it, and conveyed them away. She afterwards indicted him at the Old Bailey for feloniouſly ſtealing theſe goods, and on the trial of that indictment he was acquitted.

If *A.* is indicted for felony, and the Judge who tries the cauſe orders the juſtice before whom the information was laid to retain the goods in his poſſeſſion, until it appears who is intitled to them, it is not neceſſary to give ſuch juſtice a month's notice previous to commencing an action againſt him for the converſion of them.

But Mr. Juſtice *Buller* (before whom that indictment was tried) having doubts to whom the goods belonged, ordered them to remain in the hands of the Defendant *Reid*, who was the Juſtice of peace that had taken the information, till ſuch time as it ſhould be aſcertained who was the right owner of them.

This action was brought by *Loy's* aſſignees to recover the goods, and they proved a notice to the Defendant a month prior to the ſuing out the writ, but this action was not commenced within ſix months after the goods came into his poſſeſſion.

On an objection being made that the action could not be maintained, Lord *Kenyon* ſaid he did not think any notice neceſſary in this caſe. Theſe goods did not come to the Defendant's hands in his character of

a magiſtrate, but as a truſtee for the parties, and therefore the caſe was not within the ſtatute (*a*).

The trading not being proved the Plaintiffs were nonſuited.

(*a*) 24 *Geo.* 2. *c.* 44. *Vide* *Greenway* v. *Hurd*, *ibid.* 553. *Feltham* v. *Terry*, *Bull. N. P.* 24. *Daniel* v. *Wilſon*, 5 *T. Rep.* 1. *Irving* v. *Wilſon*, 4 *T. Rep.* 485.

BISSET *v.* CALDWELL.

Wearing apparel may be diſtrained for rent.

TRESPASS for breaking and entering the Plaintiff's houſe, expelling him therefrom, ſeizing his goods *&c.* The Defendant pleaded the general iſſue.

The defence was that the Plaintiff had taken lodgings, ready furniſhed, of the Defendant, at the rent of four guineas *per* week; and rent being in arrear the Defendant diſtrained the Plaintiff's wearing apparel, which were in the lodgings. The Plaintiff's counſel inſiſted that theſe could not be taken as a diſtreſs (*a*).

Lord KENYON. This has long been a *vexata quæſtio*, but I think they would now be held to be the ſubject of a diſtreſs. The ſame reaſon does not now exiſt, as formerly, when *averia carucæ* &c. could not be taken by the common law, becauſe the things diſtrained being then taken only as a pledge, it was conſidered that the perſon loſing thoſe things was rendered

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(*a*) *Vide* 2 *Inſt.* 132.

incapable

incapable of earning money to pay the debt, and unſerviceable to the commonwealth (*a*).

It being proved that the Defendant had expelled the Plaintiff by force from his poſſeſſion of the rooms, he had a verdict and 1 *s.* damages, but Lord *Kenyon* ſaid it was ſo ſhameful an action that he would certify under the 43d *Eliz.*

(*a*) In *Hutchins* v. *Chambers* and Others, 1 *Burr.* 579. it was held that *averia carucæ* might be diſtrained for non-payment of a poor rate, and Lord *Mansfield* gave the ſame reaſon as that above given by Lord *Kenyon*, *Vide* alſo 3 *Salk.* 136.

The KING *v.* JONES.

THIS was an indictment for perjury, committed on the trial of an information in the Exchequer againſt one *Samuel Samuel*, for importing goods contrary to the Revenue laws.

A recital that *an* iſſue came on to be tried, is ſupported by evidence that an information containing *ſeveral* counts to *each* of which the general iſſue was pleaded was ſo tried.

The indictment ſtated the information *&c.* It then ſtated "that ſuch proceedings were had that *an iſſue* was in due manner joined, and afterwards on *&c.* came on to be tried, and was tried by a Jury of the country *&c.*" On reading the information it appeared that it contained two counts, and that the Defendant had pleaded the general iſſue to each count ſeparately.

Erſkine, for the Defendant, objected that this was not a true recital. The information in the Exchequer is not an information where there is *an* iſſue joined, but one in which *two* iſſues are joined. There might

might be another information in the Exchequer, on the trial of which this perjury was committed. He was ſworn to give evidence on the trial of *two* iſſues.

Lord KENYON. I ſhould have thought the converſe of the propoſition would have held. Had the indictment ſtated that the perjury was committed on the trial of two iſſues when there was but one, it would have been fatal, but I do not think that this is any variance.

In an indictment for perjury committed on the trial of a former cauſe the proſecutor ſhould be prepared to prove the *whole* of the Defendant's evidence.

The witneſs who had taken down the Defendant's evidence proved the words on which the perjury was aſſigned, but could not ſpeak to any other part of his evidence.

Lord KENYON. The whole of the Defendant's evidence on the former trial ſhould be proved, for if in one part of his evidence he corrected any miſtake he had made in another part of it, it will not be perjury. Courts have gone ſo far as to determine, that where a miſtake has been committed in an anſwer to a bill in Chancery, if the Defendant ſet it right in a ſecond anſwer, it will ſave him from the perils of perjury (*a*).

His Lordſhip therefore directed the Defendant to be acquitted (*b*).

(*a*) The *King* v. *Carr*. 1 *Sid*. 418. (*b*) *Vide Rex* v. *Dowlin*, *poſt*.

HODGES, Eſq. *v.* WINDHAM, Eſq.

TRESPASS for criminal converſation with the Plaintiff's wife.

In an action for adultery, proof that the huſband willingly ſuffered his wife to live in a ſtate of proſtitution goes to bar the action, and not merely to mitigate the damages.

The Plaintiff and his wife parted on the 8th of *Auguſt*, 1789, and articles of ſeparation were then executed by them. After which the criminal connexion, which was the ſubject of this action, took place.

Bearcroft, for the Defendant, objected that the action could not be ſupported.

Lord KENYON ſaid it was a queſtion that he had entertained conſiderable doubts upon, but that he was inclined to ſuffer the cauſe to proceed, and take a note of the objection, that it might be brought before the Court.

The Defendant proving that the Plaintiff had, before his ſeparation from his wife, voluntarily permitted other men to have criminal connexions with her, Lord *Kenyon* ſaid it was not to be endured that a man ſhould ſuffer and encourage his wife to live in a ſtate of proſtitution, and then come into a court of juſtice to aſk damages. His having ſuffered ſuch connexion with other men was equally a bar to the action as if he had permitted the preſent Defendant to be connected with her, for ſuch a huſband could have none of that ſocial affection for his wife, the loſs of which is the ground of this action (*a*). Verdict for the Defendant.

(*a*) *Vide Smith* v. *Alliſon*, *Bull. N. P.* 27. accord.

PHETHEON *v.* WHITMORE.

Friday, Feb. 25th. At Guildhall.

Quere. Whether a party to a negotiable inſtrument can in any caſe be admitted as a witneſs to invalidate it?

ASSUMPSIT on a bill of exchange drawn by *Rayner* in favour of the Plaintiff, and accepted by the Defendant.

The Defendant offered *Rayner*, the drawer, as a witneſs to prove that the acceptance was conditional, and that the Defendant was not to pay the bill unleſs he ſhould receive a ſum of money due to *Rayner*. That the Plaintiff knew of this condition, and that the money had never been paid to the Defendant.

Erſkine contended that he was an admiſſible witneſs. On the point of intereſt no objection could be made to him, for immediately that he defeated this action he made himſelf liable as drawer, by ſhewing that this bill was never any ſatisfaction of the debt owing from him to the Plaintiff. The only remaining objection was againſt his invalidating his own ſecurity. This is not like the caſe of a man coming to ſhew that the bill was originally void; this witneſs will only prove that the ſubſequent condition on which the payment was to depend was not performed. He mentioned a caſe of *Gardner* v. *Carter*, which, he ſaid, was exactly like the preſent.

BULLER J. (who ſat for Lord *Kenyon*) ſaid he thought that this witneſs was not admiſſible, as his evidence tended to blow up the bill.

Erſkine ſaid there was a difference of opinion among the Judges on this point; my Lord *Kenyon* had taken the

the diſtinction between a party to the bill coming to prove it bad in its creation, or avoided on account of ſome ſubſequent act (*a*); though ſome of the other Judges had thought differently.

Upon this Mr. J. *Buller* ſaid he would, to prevent the cauſe coming to trial a ſecond time, admit the teſtimony of *Rayner*, ſubject to the correction of the Court: though at the ſame time his own opinion was that he was not an admiſſible witneſs.

The witneſs not proving the caſe opened, the Plaintiff had a verdict (*b*).

(*a*) *Vide Charrington* v. *Milner*, *ante* 6.

(*b*) *Vide* 3 *T. Rep.* 36. *Adams* v. *Lingard*, *poſt*.

DUNMORE *v.* TAYLOR.

ASSUMPSIT for goods ſold and delivered. Set off for goods ſold and delivered, and alſo for goods *bargained* and *ſold*.

If *A.* agree to make a waggon for *B.* and make it accordingly, but refuſe to deliver it unleſs the money is paid on delivery, the money which was to be paid for the waggon may be ſet off to any demand of *B.* againſt *A.* as goods *bargained* and ſold. *Commo. ſemble.*

On the croſs examination of the Plaintiff's witneſs it appeared that the Defendant had made a waggon for the Plaintiff, but had refuſed to deliver it unleſs the Plaintiff would get ſome perſon to join him in giving a ſecurity for the ballance which the delivery of the waggon would make in his favour. The Plaintiff was then inſolvent.

It was objected that this contract being only executory, could not be made the ſubject of a ſet off.

BULLER

BULLER J. thought it could be ſet off as goods bargained and ſold. When the cauſe had proceeded further, it appeared that it was afterwards agreed that the Plaintiff ſhould not have the waggon, but that the Defendant ſhould keep it. Upon which the Plaintiff had a verdict.

Note. After the cauſe was over Mr. J. *Buller* ſaid that he thought an *indebitatus aſſumpſit* would lie in this caſe, but that there was ſome nicety in the queſtion.

Tueſday, March 1ſt. *At Guildhall.*

GORHAM and Another *v.* THOMPSON and Another.

When partners diſſolve their partnerſhip it is incumbent on them to publiſh the diſſolution in the Gazette, or they will be all liable to an action at ſuit of a creditor who did not know of the diſſolution, and delivered goods to one thinking he was dealing with all.

ASSUMPSIT. One of the Defendants had ſuffered judgment by default.

The Defendants had been partners about ſeven years ſince, and had diſſolved that partnerſhip, but no notice of the diſſolution had been inſerted in the Gazette, nor did the Plaintiffs know of it, but thought they were dealing with both Defendants. But it appeared that the diſſolution was generally known in the neighbourhood.

Lord KENYON ſaid, to diſcharge the partner retiring from the partnerſhip there muſt be a public advertiſement in the *Gazette*, or at leaſt the diſſolution muſt be notorious to the Public, and actual knowledge of it brought home to the creditor. It would be the hardeſt meaſure imaginable upon the creditor were the

the law otherwiſe, for while he ſuppoſed he was giving credit to a man having ſufficient to ſatisfy the whole of his demand, he might be truſting a beggar.

Verdict for the Plaintiff (*a*).

(*a*) *Vide Graham* and Others *v. Hope* and Others, *poſt*.

CHAURAND and Another *v.* ANGERSTEIN.

Thurſday, March 3d. *At Guildhall.*

ASSUMPSIT on a policy of inſurance on a ſhip from *St. Domingo* to *Nantz* in *France*, loſt or not loſt.

Commercial men may be called as witneſſes to prove the meaning of any particular expreſſion uſed in a letter on a commercial ſubject.

The policy was effected on the 4th of *January*, 1790, and at the ſame time a letter of the Plaintiffs' ſhewn to the underwriter, wherein it was ſaid that the ſhip was to ſail in the month of *October* preceding. On ſeeing this letter the policy was ſubſcribed at a premium of 6 *l. per cent.* Previous to writing this letter the owners had received two letters from their captain, wherein he ſaid he reckoned he ſhould ſail between the 5th and the 10th of *October*. He did ſail on the 11th of that month.

If it is ſaid in a letter that a ſhip will ſail from *St. Domingo* in the month of *October*, it is generally underſtood that ſhe will not ſail till the 25th of that month.

On the part of the Defendants ſeveral merchants and commercial men were called, who ſaid that the expreſſion "in the month of *October*" was well underſtood amongſt men uſed to commercial affairs to ſignify ſome time between the 25th of that month, and the 1ſt or 2d of the ſucceeding month; and they ſaid that had it been conceived that the ſhip was to ſail between the 5th and 10th of *October*, it would have made a difference of 15 *per cent.* in the premium, and

and many underwriters would not have ſubſcribed the policy on any terms. Mr. *Barnwell*, who was alſo examined as a witneſs, ſaid, that he underſtood the expreſſion to ſignify that the voyage was to commence on the 15th or 20th of *October*, and not before.

Lord KENYON. The party was in poſſeſſion of theſe letters two months before the aſſurance was made. He might have ſent copies of them without garbling any part of them, and then the underwriters might have judged for themſelves. The evidence of underwriters is good evidence on this ſubject. In queſtions on the arts and ſciences the evidence of perſons verſed in thoſe arts is daily admitted. Foreign laws are alſo matters of evidence, and yet all theſe are only the opinions of the witneſſes (*a*). His Lordſhip therefore left it to the Jury to conſider whether this was not ſuch a material ſuppreſſion of facts as avoided the policy.

The Jury found for the Defendant.

In the following term a rule to ſhew cauſe why a new trial ſhould not be had, was obtained by the Plaintiff, but upon cauſe being ſhewn againſt that rule it was diſcharged, and the verdict eſtabliſhed.

(*a*) *Vide Thornton* v. *The Royal Exchange Aſſurance Company, ante* 25.

BELL *v.* DRUMMOND, Executor, *&c.*

If a clerk to the commiſſioners of the land-tax be appointed clerk to the commiſſioners for managing other taxes, his deputy who performed all the duties of his office is not therefore intitled to an increaſe of ſalary.

THIS was an action of *aſſumpſit* for work and labour done and performed by the Plaintiff for *Paterſon* the teſtator.

It appeared that the teſtator was clerk to the commiſſioners of the land-tax, and that the Defendant had done the buſineſs of his office at a ſalary of 100*l.* a year. That afterwards, on new duties (ſuch as the ſervants' tax *&c.*) being impoſed, the teſtator was appointed clerk to the commiſſioners of thoſe duties, and the Plaintiff alſo tranſacted that buſineſs, but no agreement had been made as to any increaſe of ſalary, though the labour of the office was conſiderably increaſed.

A gentleman of the name of *Till* was called, who proved that the Plaintiff having demanded an additional ſtipend the teſtator had deſired the witneſs (as a friend to both parties) to conſider what ought to be allowed the Plaintiff. That accordingly the witneſs did proceed to make an eſtimate, but before he had finally made up his mind the teſtator died.

All money due on account of the ſettled ſalary of 100*l.* had been paid; the only queſtion therefore was whether the Defendant was intitled to any additional ſalary.

Lord KENYON ſaid, that had the Plaintiff's caſe reſted wholly on the fact of the new duty being impoſed upon him, he ſhould not think it ſuch a caſe as would have intitled him to come into a court of juſtice for an additional ſtipend on a *quantum meruit:* if it was, every porter in a ſhop, or clerk in an office, would

would upon an increaſe of his maſter's buſineſs be equally intitled to demand an increaſe of wages. But upon the evidence produced it appeared clearly that the teſtator himſelf thought that he ought to pay ſomething, and the only matter in controverſy between him and the Plaintiff was the *quantum* of the additional allowance.

The Plaintiff had a verdict.

LOWDEN *v.* GOODRICK.

Under the *alia enormia* in treſpaſs, no facts can be given in evidence which might conſiſtent with decency be ſtated in the declarat.on.

TRESPASS and falſe impriſonment.

Juſtification, under the act of 29 *Geo.* 3. (*a*) as a ſuperior officer, the Plaintiff having behaved mutinouſly on board a *Guinea* ſhip.

The Plaintiff proved that for thirteen weeks he was kept in irons on the coaſt of *Africa*, and during all that time was expoſed to the burning ſun and heavy ſhowers of that country, and that the irons galled his wriſts ſo much that they were in danger of mortification. Further his counſel offered to prove that he was ſtinted in his allowance of food, contending that this, though not laid in the declaration, might be given in evidence to prove the malice of the Defendant.

Lord KENYON. It has been many times determined that nothing can be given in evidence under the *alia enormia*, except acts which could not be put

(*a*) 29 *Geo.* 3. *c.* 66. § 19.

on the record. It is no part of the declaration. In actions for criminal converſation and the like, things which could not with decency be put upon the record, may be proved under the *alia enormia*; but evidence like that now offered cannot be admitted under it (*a*).

The Defendant having called witneſſes, and proved that the Plaintiff had not been wholly blameleſs, the Jury found a verdict for the Plaintiff 100 *l.* damages.

(*a*) *Vide Pettit* and *Addington*, *poſt*.

STUBBING *v.* HEINTZ.

ASSUMPSIT for goods ſold and delivered.

If a maſter gives his ſervant money to buy meat for the uſe of the family, and the ſervant inſtead of paying ready money orders the meat on credit and embezzles the money, the maſter is not liable.

At *Midſummer* 1784, the Defendant contracted with the Plaintiff to ſerve him with all kinds of meat at 5½d. *per* lb. for *ready money*. The cook maid was accuſtomed to order the meat, and when the bill amounted to a few ſhillings or a guinea, uſed to pay it; in general ſhe paid once a week, on a *Monday* morning; and the Defendant always gave the ſervant money to pay the bills. This courſe of dealing continued for a long time, and ſeveral ſucceſſive ſervants paid the money they received from the Defendant as above ſtated. At length the Defendant got another cook maid, and gave her money as uſual, but ſhe did not pay the bills as the others had done, but ſuffered them to be in arrear 33 *l.* 3 *s.* 3 *d.* She then run away from the Defendant's houſe, after which the Defendant was called upon, for the firſt time, to pay this ſum of money, and on his refuſal the Plaintiff brought the

the preſent action. The Defendant alſo proved that when his family were abſent from town in the ſummer, a ſervant, who was left to take care of the houſe, had meat for her own ſupport from the Plaintiff, and paid him for the ſame, but he never demanded this ſum of money from that ſervant, or mentioned to her that it was owing to him from the Defendant.

Lord KENYON ſaid nothing could be clearer than that where a man gives his ſervant money to pay for commodities as he buys them, if the ſervant pockets that money, the maſter will not be liable to pay it over again. But if the maſter employs his ſervant to buy things on credit, he will be liable to whatever extent the ſervant ſhall pledge his credit. Here the contract between the parties was to deal for ready money: and the Plaintiff when he let the bill run on to ſuch an amount as the ſum now claimed, was giving credit to the ſervant, and not to the Defendant. The Defendant had not entered into any new contract, but ſtill thought that he was dealing on the ſame terms as before.

Verdict for the Defendant (*a*).

(*a*) *Vide Gilbert's Law. Ev.* 183.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM,

31 GEORGE III. 1791.

YOUL *v.* HARBOTTLE.

Tueſday, June 7th, At Weſtminſter.

TROVER for goods.

The Plaintiff had put the goods in queſtion on board the Defendant's packet-boat, to be carried from *London* to *Graveſend*. Another perſon coming to the Defendant's houſe, and ſaying that theſe goods belonged to him, the Defendant *under a miſtake* delivered them to him.

If a carrier has goods to carry, and *by miſtake* deliver them to a wrong perſon, this is ſuch a tortious converſion as will ſupport an action of *trover* at the ſuit of the right owner.

Mingay, for the Defendant, objected that upon this evidence the Plaintiff muſt be nonſuited. Here was no evidence of a converſion, and though the Defendant was liable to a ſpecial action on the caſe, yet *trover* could not be ſupported.

Erſkine relied on the caſe of *Syeds* and Another v. *Hay* (*a*), determined laſt Term, which, he ſaid, ſhewed this act of the Defendant to be a converſion.

Lord KENYON. That caſe was determined on ſuch peculiar circumſtances, that it is hardly poſſible it ſhould ever apply as an authority in a caſe not exactly parallel with it. I agree that when a carrier loſes goods by accident (*b*), trover will not lie againſt him, but when he delivers them to a third perſon and is an actor, though under a miſtake, this ſpecies of action may be maintained.

Verdict for Plaintiff.

(*a*) 4 *T. Rep.* 260. (*b*) *Vide* 2 *Salk.* 655.

SMITH and Another *v.* PICKERING.

If a trader deliver over a bill for a valuable conſideration to another and forget to indorſe it, he may indorſe it after he has become a bankrupt.

ASSUMPSIT by the indorſees of a bill of exchange againſt the acceptor. The bill was drawn by *Richardſon* and *Hill* on the Defendant, and was payable to the order of the drawers. They delivered it to the Defendant for a valuable conſideration, but forgot to indorſe it. Afterwards they became bankrupts, and then *Richardſon* made an indorſement on the bill.

Lord KENYON. I am clearly of opinion, that this is a good indorſement by the bankrupts. The Plaintiffs had the equitable claim, and it is clear that nothing paſſes to the aſſignees of a bankrupt, but property that really and beneficially belongs to the bankrupt.

rupt. Though the bankrupts had the legal eſtate in this bill, yet it was unattended by any intereſt, and they were bound to indorſe it.

Verdict for Plaintiff.

Note. The bankrupt *Richardſon* was permitted to give this evidence, though *Hill* had delivered the bill to the Defendant. Lord *Kenyon* holding that what *Hill* had told *Richardſon*, *at the time*, might be given in evidence *by him*, the act of one partner being the act of the other; and the acknowledgment made by *Hill* to *Richardſon* being againſt his own intereſt. *Hill*, had abſconded. In the next term *Mingay* moved for a new trial, on the ground that *Richardſon*'s evidence was not admiſſible, *but the Court diſcharged the rule.*

And in ſuch caſe the evidence of one partner that his partner had told him at the time he had paid it away is admiſſible.

WILLIAMS qui tam v. PULLEY.

Wedneſday, June 8. At Guildhall.

In an action for inſuring tickets in the *Iriſh* lottery, the act of parliament eſtabliſhing ſuch lottery muſt be proved.

DEBT for ſeveral penalties for inſuring tickets in the *Iriſh* lottery.

The firſt count of the declaration ſtated that the Defendant received a ſum of 9*d.* to repay 1*l.* 1*s.* in caſe a certain ticket therein mentioned "in a certain *Iriſh* Lottery, authorized and eſtabliſhed by a certain *Iriſh* act of parliament, made and paſſed in the 29th year of the reign of his preſent Majeſty, ſhould be drawn *&c.*"

Erſkine, for the Defendant, objected that the act of parliament ſhould be proved before any evidence was admitted of the inſurance.

Bearcroft, for the Plaintiff, contended that the Defendant having admitted, by the inſurance, that ſuch

an act of parliament did exiſt, ſhould not be permitted now, to diſpute it.

Lord KENYON. I agree that in many caſes a man may be eſtopped by his own acts from conteſting his ſituation, even in a penal action: thus if a man, *acting* as a commiſſioner of exciſe, ſolicits votes at an election, I would not oblige the Plaintiff to prove that he was in fact appointed to that office. Had this declaration merely ſtated that he had inſured a ticket in a certain *Iriſh* lottery, it perhaps would not have been neceſſary for the Plaintiff to prove the act of parliament or lottery; but as a particular act of parliament is here ſtated, it is incumbent on him to prove that ſuch an act of parliament did exiſt.

The Plaintiff was nonſuited.

HUMPHREY *v.* MOXON.

The drawer of a bill of exhange may be a witneſs for the acceptor to prove it paid.

ASSUMPSIT on a bill of exchange, indorſee againſt acceptor.

The Defendant's counſel offered to call the drawer to prove that the bill was paid by him, and relied on the caſe of *Gardner* and *Carter*, determined ſome time ſince.

Erſkine objected to this witneſs. This caſe differs from that of *Gardner* and *Carter*, there the payee was the Plaintiff; this action is brought by the indorſee.

Lord KENYON. It makes no difference. The Courts have laid down a rule that a man ſhall not *deſtroy* his own ſecurity. This man does not come to

to *deſtroy* his ſecurity, but to ſhew that it has been ſatisfied.

He was therefore received, but it appearing that notice had been given to him, the day after the bill became due, of its having been diſhonoured by the acceptor, he was again objected to on account of intereſt.

Lord KENYON inclined to think this laſt objection a good one, becauſe being liable to pay the bill himſelf on account of due notice having been given, by proving it paid now he deſtroyed the bill, and would eventually diſcharge himſelf. His Lordſhip however doubting whether the notice was given early enough, did not reject, but admitted his teſtimony, ſubject to the opinion of the Court if the Plaintiff choſe to move for a new trial.

Quere. Whether the drawer can be a witneſs if he has had regular notice of the bill having been diſhonoured.

The bill was for 73 *l.* and the witneſs proving payment of 30 *l.* only, the Plaintiff had a verdict for the balance (*a*).

(*a*) *Vide Charrington* v. *Milner*, *ante* 40. And *Adams* v. *Lingard* *ante* 6. *Phetheon* v. *Whitmore*, *& al' poſt.*

SPITTY *v.* BOWENS.

Thurſday, June 9th. *At Weſtminſter.*

THIS was an action on the caſe for not putting a buoy over a barge of the Defendant's which had ſunk in the *Thames*; by reaſon whereof a barge laden with corn belonging to the Plaintiff was ſunk, and the corn much injured.

In an action for ſinking a barge, on board of which the Plaintiff had a cargo of corn, the maſter may be a witneſs for him upon being releaſed.

To prove the accident the Plaintiff releaſed the maſter of the barge, on board of which his corn was, and called him as a witneſs.

Bearcroft objected to him. If the Defendant is liable to make amends to the Plaintiff, he is liable alſo to make amends to the witneſs for the damage done his barge; and the record of the recovery in this action would be evidence againſt the Defendant in an action at the ſuit of the witneſs.

Lord KENYON thought that the record in this cauſe would not be evidence in that, and therefore that he was a competent witneſs, but offered to ſave the point if the Defendant's counſel deſired it.

The weight of evidence being in favour of the Defendant, he obtained a verdict.

HENBEST and Others, Aſſignees, &c. *v.* BROWN.

If a trader buy goods on credit and commit an act of bankruptcy, the creditor may take out a commiſſion before the day of payment under the 5 *Geo.* 2. *although* no written ſecurity is given for the debt. *Comme ſemble.*

THE petitioning creditor's debt in this caſe was for goods ſold and delivered; and the Defendant endeavoured to prove that credit was to have been given for them, and that the commiſſion was taken out before the day of payment arrived.

Lord KENYON ſaid, the inclination of his mind was, that all debts whatever, though not due, were ſufficient, under the ſtatute (*a*) to ſupport a commiſſion, and that the act was not confined merely to bond debts, notes and bills.

But it not being proved that any credit was to have been given, this point was no further diſcuſſed (*b*).

(*a*) 5 *Geo.* 2. *c.* 30. (*b*) *Vide Cockran* v. *Love*, 1 *Co. Bank. L.* 23. accord.

FORES *v.* WILSON.

Friday, June 10th. *At Weſtminſter.*

THIS was an action for aſſaulting the maid ſervant of the Plaintiff, and debauching her *per quod ſervitium amiſit.*

A maſter may maintain an action for debauching his ſervant, though he is no ways related to her in blood.

The ſervant was no relation to the Plaintiff, but merely a ſervant. The Plaintiff proved by his firſt witneſs that the Defendant enticed the girl to leave the Plaintiff's ſervice, and kept her to live with him for ſome time; he then called a witneſs to prove that he had debauched her.

Erſkine, for the Defendant, objected to this evidence, contending, that this action being brought by a perſon who was no relation to the perſon ſeduced, the Jury could not take the injury which ſhe had ſuſtained into their conſideration.

In an action for debauching a ſervant *per quod* &c. it is not neceſſary to prove that ſhe was employed as a menial ſervant.

Lord KENYON. This is an action in which damages may be given to recompence the ſervant for the injury ſhe has received. Undoubtedly there muſt ſubſiſt ſome relation of maſter and ſervant, but this action materially differs from the common action for ſeducing a hired ſervant to leave her maſter's ſervice. In that kind of action the Plaintiff muſt prove that the Defendant knew the ſervant was in his ſervice, but no ſuch knowledge is neceſſary to ſupport this action. And though a degree of the relation of maſter and ſervant muſt ſubſiſt, yet a very ſlight relation is ſufficient; as it has been determined, that when daughters of the higheſt and moſt opulent families have been ſeduced, the parent may maintain an action, on the *ſuppoſed* relation of maſter and ſervant,

though every one muſt know that ſuch a child can not be treated as a menial ſervant (*a*).

Verdict for the Plaintiff (*b*).

(*a*) *Vide Jones* v. *Brown* and Another, *poſt.*

(*b*) *Vide Edmondſon* v. *Machel*, 2 *T. Rep.* 4.

BAYLEY *v.* GOULDSMITH.

Saturday, June 11th. *At Weſtminſter.*

If goods are delivered on the terms of ſale or return, and the perſon receiving them does not return them in a reaſonable time, the value of them may be recovered in an action for goods ſold and delivered.

ASSUMPSIT for goods ſold and delivered.

The goods were delivered on the terms of ſale or return, ſo long ſince as the beginning of the year 1789, and conſiſted of waiſtcoats made in *England*, exported to *France*, there embroidered and imported again into *England*.

Two queſtions were made, firſt on the ſale and return, the Defendant contending that he was not obliged to keep theſe goods. 2dly. Whether the goods were contraband or not.

Lord KENYON, as to the firſt point, ſaid that no certain time being mentioned for the return of the goods, the Jury ſhould conſider whether a reaſonable time had elapſed for the return according to the uſual courſe of dealing in that trade. His Lordſhip was inclined to think there had, and if the Jury ſhould be of that opinion he ſhould conſider them as goods *ſold and delivered*. As to the ſecond point, his Lordſhip ſaid he would not determine it at *Niſi Prius*, but wiſhed the Jury to leave that for the opinion of the Court, if they ſhould find for the Plaintiff on the firſt point.

The

The jury were about finding for the Defendant, as to all the money claimed except 1 *l.* 5 *s.* (the value of one of the waiſtcoats) upon which the Plaintiff's counſel conſented to a nonſuit, to avoid the conſequences of the Court of Conſcience act.

POWELL qui tam *v.* FARMER.

DEBT on the ſtatute of the 5th of *Eliz.* for uſing the trade of a Baker, not having ſerved an apprenticeſhip thereto.

In a penal action for exerciſing a trade not having ſerved an apprenticeſhip the plaintiff is not obliged to prove that Defendant uſed the trade all the time laid in the declaration, if it is ſaid that he forfeited 40 *s.* for each month.

The firſt count ſtated, that the Defendant did *ſet up*, uſe and exerciſe the myſtery, *&c.* of a Baker for a long time; to wit, from *&c.* to *&c.* being eleven months without, *&c.* whereby he forfeited the ſum of 22 *l. to wit*, 40 *s. for each and every month* during which, *&c.*

The ſecond count ſtated that he did *uſe*, *&c.*

The Plaintiff did not prove that the Defendant uſed the trade for all the time laid in the declaration, but only a part of it.

Lord KENYON. It being laid that the Defendant forfeited 40 *s.* for *every* month during which he exerciſed the trade, the Plaintiff is entitled to recover as many penalties of 40 *s.* as he can prove months in which the Defendant uſed the trade. He is not obliged to prove that the Defendant exerciſed the trade during all the time laid in the declaration.

Verdict for the Plaintiff for one penalty of 40 *s.*

Wednesday, June 15th. At Westminster.

HOLLAND qui tam *v.* DUFFIN.

An illegal policy of insurance on lottery tickets may be read in evidence without being stamped.

THIS was an action to recover several sums of money forfeited for insuring tickets in the lottery, contrary to the statute 22 *Geo.* 3. *c.* 47.

The Plaintiff gave in evidence a paper, purporting to be a policy of insurance.

Mingay objected that this paper could not be read in evidence, unless it was stamped with a 6 *s.* agreement stamp.

Garrow answered, that it was an illegal contract, and therefore could never be intended by the Legislature to be the object of taxation and revenue.

Lord KENYON thought it was good evidence without any stamp, but said he would save the point if the Defendant desired it.

If several tickets are insured at the same time it makes but one offence.

Ten tickets were insured at the same time. It was contended by the Plaintiff's counsel that the Plaintiff was entitled to recover a separate penalty on each ticket, each being a separate contract.

But Lord KENYON said, that the act of parliament having enacted, that if any person should insure any ticket *or Tickets* he should forfeit for such offence 50 *l.* he thought this but one offence; but had they been insured at *different times*, though on the same day, he should agreeable to the decision of the Court in (*a*) *Brooke* and *Milliken*, have held them to be distinct offences.

Verdict for the Plaintiff for one penalty of 50 *l.*

(*a*) 3 *Term Rep.* 509.

KANNEN *v.* M'MULLEN.

Thurſday, June 16th, *At Weſtminſter.*

It is a good defence in an action by an Apothecary that he treated the patient ignorantly or improperly.

Aliter if the medicines were adminiſtered under the direction of a phyſician.

THIS was an action for work and labour as a Surgeon and Apothecary, and medicines adminiſtered.

The Plaintiff's caſe being proved, the Defendant called Mr. *Cline* and Dr. *Letſom*, who ſaid that, from the Plaintiffs' bill, it appeared that the Defendant had been very improperly treated, as medicines perfectly inconſiſtent with each other had been adminiſtered. They confeſſed that diſorders would ſometimes take a ſudden turn, and that they could not judge ſo well as they ſhould have been able to do had they attended the Defendant.

Erſkine in his reply to the jury, contended that in this action a very different queſtion was to be tried, than in an action by the patient againſt the Surgeon, for improper treatment. Lord *Mansfield* he ſaid had held that in no caſe could the Defendant make improper treatment a ground of defence, becauſe the Plaintiff could not have proper notice of that defence, and be prepared to anſwer it, as in an action againſt him; but Lord *Kenyon* had laid down a rule that where *plain* miſconduct appeared, the Plaintiff ſhould not be permitted to recover any damages; but this muſt be a plain and certain miſconduct, not one on which the minds of the jury could by poſſibility doubt.

Lord KENYON. In a caſe where the demand is compounded of ſkill and things adminiſtered, if the ſkill, which is a principal part, is wanting, the action fails, becauſe the Defendant has received no benefit.

Many

Many caſes may be imagined where great miſchief would happen were the law otherwiſe. If a man is ſent for to extract a thorn which might be pulled out with a pair of nippers, and through his miſconduct it becomes neceſſary to amputate the limb; ſhall it be ſaid, that he may come into a court of juſtice to recover fees for the cure of that wound which he himſelf has cauſed? I do not ſay that this caſe amounts to that put, but where ſhall the line be drawn? If the medicines applied, had been given under the direction of a Phyſician, however improper they might be, the action ſhould be ſupported becauſe the ſkill would not in that caſe be the ground of the action. His Lordſhip after commenting upon the evidence left it to the jury to conſider whether or not the Plaintiff had miſconducted himſelf, for upon that muſt their verdict depend.

The jury found for the Plaintiff for the money charged for medicines.

BLAND *v.* SWAFFORD.

No *action* lies againſt a witneſs for non attendance, unleſs the cauſe has been called on and the jury ſworn.

THIS was an action againſt the Defendant for not appearing as a witneſs on the trial of an ejectment wherein *Bland* was leſſor of the Plaintiff agreeable to a *ſubpœna* with which the Defendant had been ſerved; by reaſon whereof the Plaintiff was obliged to withdraw his record.

Lord KENYON declared himſelf of opinion, that the action would not lie againſt a witneſs merely on the record being withdrawn, nor in any caſe unleſs the cauſe had been called on and the jury ſworn. The

court

court had no juriſdiction till ſuch time as the jury was ſworn, and if the Plaintiff meant to bring an action againſt the witneſs for not attending, he ſhould have ſuffered the cauſe to be called on and have been nonſuited, after which he might have maintained the preſent action. His Lordſhip was proceeding to order the Plaintiff to be called; when *Mingay* the Plaintiff's counſel deſired that the point might be ſaved, which was conſented to.

The merits being againſt the Plaintiff, he was nonſuited.

BARBER *v.* BACKHOUSE and Others.

ASSUMPSIT on a bill of exchange. *Brown* one of the Defendants had ſuffered judgment by default, the other Defendants had paid 5 *l.* 9 *s.* into court.

If there is no conſideration for part of the ſum contained in a bill of exchange, the jury may apportion the damages and need not find to the whole amount.

As to the remainder of the money contained in the bill, they contended they were not liable. The caſe was as follows, the 5 *l.* 9 *s.* paid into court was the amount of the Plaintiff's bill for buſineſs done as an Attorney *for all the Defendants*; the remainder of the money was for buſineſs done for *Brown* only. The bill was drawn by *Brown* on the partnerſhip, and accepted by him *unknown to the other* Defendants.

Law for the Plaintiff contended, that the 5 *l.* 9 *s.* paid into court, could not be applied to any other count but that on the bill of exchange, for there was no count on an Attorney's bill; and if the bill was good for part it was good for the whole.

Lord

Lord KENYON declared himſelf to be clearly of a contrary opinion, and on this opinion a verdict was given for the Defendant.

Law ſaid he would look into the caſes, and take the opinion of the Court upon them, if he found them favourable to him. He never moved the Court for a new trial; but upon Lord *Kenyon* in the next term mentioning this caſe in the courſe of argument, Mr. *Law* ſaid he was perfectly ſatisfied with the deciſion (*a*).

(*a*) *Vide Ledger* v. *Ewer*, poſt accord'. *Sed vide* 2 *Burr.* 1082. where Mr. J. *Denniſon* is reported to have ſaid, "there is a diſtinction between the *contract* "and the ſecurity. If part of "the *contract* ariſes on a good "conſideration, and part on a "bad one, *it* is *diviſible*. But it "is otherwiſe as to the *ſecurity*. "*That being entire*, is bad for the "whole."

Friday, June 17. *At Weſtminſter.*

PETTIT *v.* ADDINGTON, Eſq;

In treſpaſs, and falſe impriſonment, the Plaintiff cannot give evidence of his health being injured, unleſs laid under a *per quod*, the common concluſion that he became and was ſick, weak, &c. is not ſufficient. 2. Whether a juſtice of peace has a right to commit for a contempt when not ſitting in court?

ASSAULT and falſe impriſonment.

The Plaintiff had obtained a warrant from Mr. *Walker* a magiſtrate, to apprehend a man for an aſſault; and it not having been executed, ſhe, on the 23d of *Auguſt* 1790, applied to the Defendant, who was alſo a magiſtrate. He being at that time engaged in other buſineſs, the Plaintiff forced herſelf into his room, and behaved there with great indecency, making a noiſe, and inſiſting on her buſineſs being attended to. The Defendant deſired her to be quiet, and threatened to commit her unleſs ſhe altered her conduct. She ſtill perſiſted, and he committed

ted her to *Tothil Fields Bridewell*, where ſhe remained until the 23d of *October* following.

Whilſt ſhe was in priſon, ſhe (as was alledged by her counſel) caught the gaol fever, and communicated it to her huſband, in conſequence of which he died.

The Declaration ſtated, that the Defendant aſſaulted, *&c.* and impriſoned the Plaintiff, and kept and detained, *&c.* from, *&c.* to, *&c. during all which time* ſhe laboured under great pain of body and anxiety of mind, and *became and was* ſick, weak and diſtempered.

Lord KENYON ſaid, that as this was not laid with a *per quod* the jury could not take into their conſideration, nor could he receive evidence of the fact of her getting the gaol fever; for it did not appear to be in conſequence of the impriſonment. As to the great queſtion whether a magiſtrate, not ſitting as chairman of a court, but at his private office, could commit for a contempt, he muſt own he had a leaning on his mind, but ſtill he would not deliver or intimate any opinion, as he wiſhed it to be ſeriouſly conſidered and determined in court. His Lordſhip therefore directed the jury to find a verdict for the Plaintiff, ſubject to the opinion of the Court on that point (*a*)

In the following term this cauſe was argued by *Erſkine* for the Plaintiff; but the Court did not then give judgment, and I believe the caſe has not ſince been before the Court.

(*a*) *Vide Lowden* v. *Goodrick, ante.*

DAWE and Others *v.* HOLDSWORTH, and Others.

To ſupport a commiſſion of bankrupt it is neceſſary that the petitioning creditor's debt ſhould be *contracted* before the bankrupt ceaſes to be a trader.

But if the debt is *contracted* whilſt he is in trade, and a bond is given for it afterwards, it is ſufficient.

TROVER for horſes, *&c.* which had been aſſigned by one *Pittard* to the Plaintiffs, under a bill of ſale.

The defence ſet up was, that *Pittard* had become a bankrupt, and that the Defendants were his aſſignees. That after this bill of ſale he continued in poſſeſſion of the waggons and horſes, ſelling ſome and buying others in their room, and exerciſing every act of ownerſhip over them; wherefore, as againſt the Defendants, this bill of ſale was fraudulent and void.

To eſtabliſh the bankruptcy, the Defendants proved that *Pittard* was a trader, and continued ſo till the year 1785; when he became indebted to one creditor in 200 *l*; upon whoſe petition a commiſſion of bankrupt iſſued againſt him. The debt was contracted for goods ſold, but a bond was afterwards given.

Bearcroft for the Plaintiff objected, that they could not give other evidence of the debt, than by proving the bond.

Lord KENYON. Though the bond would be a bar to an action on the ſimple contract, yet it does not preclude the Defendants in this caſe from proving the conſideration. If it were ſo, a man becoming indebted whilſt a trader, and giving a bond for the debt after he had left off buſineſs, could not be made a bankrupt on it. But I hold the contrary to be clearly the law, for the queſtion to be conſidered is, whether the debt was *contracted* during the time he was a trader.

The

The Plaintiff on the croſs examination of the Defendant's witneſs, proved that there were other dealings between the bankrupt and the petitioning creditor after 1785, when the bankrupt ceaſed to be a trader, and that though at the time the commiſſion was taken out, there was a conſiderable larger balance than 200 *l.* due to the petitioning creditor, yet that more than 200 *l.* had been paid on account between the year 1785 and that time.

Lord KENYON. As no particular directions were given about the application of the money paid on account, I muſt place it to pay off the old debt firſt, if ſo it appears that no part of the debt contracted during the time *Pittard* was a trader, was due when the commiſſion iſſued, and conſequently it is unſupported. (*a*)

The jury therefore found a verdict for the Plaintiff.

(*a*) *Vide Co. Bank. Law* 22, &c. *Meggot Aſſignee, &c.* v. *Mills & a'*, 1 *Ld. Raym.* 286. acc.

KEMPLAND *v.* MACAULEY.

Evidence that the original defendant acknowledged the debt is admiſſible in an action againſt the ſheriff, for a falſe return. 4 Term Rep. 436. S. C.

THIS was an action againſt the ſheriff of *Middleſex*, for a falſe return of a *fieri facias*.

The ſheriffs were nominal Defendants only, the real Defendant was another creditor who had alſo ſued out a *fieri facias* againſt the goods of the debtor; but which execution was not delivered to the ſheriff till after that at the ſuit of the Plaintiff had been delivered. The Defendants levied the goods on the other writ in preference to the Plaintiff's, contending that his writ was fraudulently ſued out to cover the goods.

Of courſe the real exiſtence of the Plaintiff's debt came in queſtion.

Amongſt other evidence the Plaintiff called a witneſs to prove that the Defendant in the former cauſe (who was the ſon of the Plaintiff) had acknowledged to him that he owed the debt.

Erſkine for the Defendant, objected that though this was good evidence againſt the original Defendant, yet it was not ſo in this action, for the defence was that this admiſſion was fraudulent and made for the purpoſe of protecting the goods againſt fair creditors. If this was to be allowed, two perſons who meant to defraud a third, would always have it in their power to do ſo.

Lord KENYON thought this good evidence in this cauſe. It is the daily practice in actions brought by aſſignees of a bankrupt, to prove declarations of the bankrupt before he became ſo: but at the ſame time his Lordſhip ſaid he would take a note of the objection.

If a *fi. fa.* is delivered to the ſheriff, and he is directed not to levy thereon till a future day, and in the mean time another writ is delivered, he is to levy on the ſecond writ as if no other had been delivered to him.

The Defendant then produced a letter from the Plaintiff's attorney to the ſheriff's officer, wherein he directed him not to levy under the writ till a future day; before which day arrived, the other creditor's writ had come to the office, and the ſheriff levied thereon.

Lord KENYON was of opinion, that though in general the ſheriff muſt firſt levy on the writ which he firſt receives, yet if the Plaintiff in that writ directs it not to be executed before a diſtant day, and in the mean time another execution comes, the ſheriff is not to keep the firſt writ hanging over the head of other creditors, but is to levy under the laſt execution as if no other had ever been delivered to him.

On

On his Lordſhip declaring his opinion, the Plaintiffs counſel conſented to a nonſuit (*a*).

(*a*) *Vide Smallcomb* v. *Buckingham, Salk.* 320. 1 *Lord Raym.* 251. accord'.

PHILPOT *v.* HOLMES.

Saturday, June 18th, *At Weſtminſter.*

TRESPASS for breaking and entering cloſe, *&c.* Plea general iſſue.

Where the Plaintiff is in the *actual* occupation of the cloſe, the Defendant cannot, in an action of treſpaſs, give evidence of property in a ſtranger under the general iſſue.

The Plaintiff proved that he was in the actual poſſeſſion of the cloſe in queſtion, and that the Defendant committed the treſpaſs complained of. In anſwer to this the Defendant offered to prove that a part of this cloſe was the property of other perſons, and that the Defendant by their orders entered that part.

Lord KENYON. Where the land is not in the *actual* poſſeſſion of any perſon, as commons and the like; the Defendant may prove the *legal* poſſeſſion to be in a third perſon, on the general iſſue; but as in this caſe the Plaintiff was in the actual occupation, though he had no legal right whatever, the Defendant cannot defend himſelf on theſe pleadings.

Verdict for the Plaintiff.

WARWICKE *v.* NOAKES.

Tueſday June 21. at *Guildhall.*

ASSUMPSIT for goods ſold and delivered, and money had and received.

If a debtor is directed by his creditor to remit money by the poſt, and it is loſt, the creditor muſt bear the loſs.

The Plaintiff was a hop merchant, and the Defendant his cuſtomer, living at *Sherborne* in *Dorſetſhire*. The Plaintiff ſold him hops, and alſo ſold hops to ſeveral perſons in that neighbourhood; and requeſted the Defendant (as his friend) to receive the money due to him from his other cuſtomers, and remit him by the poſt a bill for thoſe ſums, and alſo the money due to him from the Defendant himſelf. A bill was accordingly remitted, but the letter got into bad hands, and the bill was received by ſome third perſon at the banker's on whom it was drawn.

Lord KENYON. Had no directions been given about the mode of remittance, ſtill this being done, in the uſual way of tranſacting buſineſs of this nature, I ſhould have held the Defendant clearly diſcharged from the money he had received as agent. It was ſo determined in the Court of Chancery 40 years ſince: and as the Plaintiff in this caſe directed the Defendant to remit the whole money in this way, it was remitted at the peril of the Plaintiff.

The Plaintiff was nonſuited.

WILLIAMS *v.* DYDE and Others.

Where a bankrupt promiſes to pay a debt due before his bankruptcy, the Plaintiff may declare generally on the original conſideration.

TO this action of *aſſumpſit* for goods ſold and delivered, the Defendant pleaded his diſcharge under a commiſſion of bankruptcy.

The Plaintiff's counſel ſtated, that the Defendant had promiſed to pay the debt, after he was diſcharged by his certificate.

Erſkine

Erſkine for the Defendant, objected that this promiſe could not be given in evidence under the count for goods ſold and delivered. To avail himſelf of this promiſe, the Plaintiff ſhould have declared ſpecially, that the Defendant being indebted, and having been diſcharged under the commiſſion, promiſed to pay the debt from which he had been ſo diſcharged.

Lord KENYON. I think this declaration is ſufficient as it ſtands in caſes where the ſtatute of limitations have been pleaded, the replication that he did promiſe within ſix years has always been held ſufficient, for the new promiſe revives the old debt.

Verdict for the Plaintiff. (*a*)

(*a*) *Ruſſell* v. *Hardman, K. B. Mich. Term* 33 *Geo.* 3. accord.

WRAY Aſſignee, &c. *v.* BARWIS.

Wedneſday, June 22d.

THIS was an action for money had and received. The Plaintiff and the Defendant were joint aſſignees under a commiſſion of bankrupt; but the Defendant having received money due to the bankrupt's eſtate for which he had not accounted, the creditors preſented a petition to the Lord Chancellor for his removal, who, upon hearing of that petition, made an order to remove him, and that the Plaintiff, the other aſſignee, "might proceed as he ſhould "be adviſed," but no ſpecific directions were given for the bringing this action.

If an action brought under the direction of the Court of Chancery is defeated by a formal objection, that court will make the perſon taking ſuch objection pay all coſts.

Q. Whether the aſſignee of a bankrupt can maintain an action for money had and received againſt his co-aſſignee who has been removed. (*a*)

(*a*) See *Smith and Others* v. *Jameſon, and Another, poſt.*

Bearcroft for the Defendant, was proceeding to make a formal objection to the action, but he was ſtopp'd by Lord *Kenyon*, who ſaid it would be prejudicial rather than advantageous to the Defendant to nonſuit the Plaintiff in this action, for that it was a conſtant rule in the Court of Chancery, to make the Defendant pay all coſts when he defeated an action brought under the direction of that court, by a formal objection; and though this action was not ſpecifically directed by the Court, ſtill the conſequence would be the ſame to the Defendant.

Verdict for the Plaintiff.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY TERM.

31 GEORGE III. 1791.

LONGCHAMPS dem. EVITTS *v.* FAWCETT.

1791.
Friday, July 15.
at *Guildhall.*

In an ejectment between two perſons (both claiming under a demiſe from the ſame perſon) the landlord, who has become a bankrupt, may be a witneſs to prove that the premiſſes in diſpute were not included in the firſt leaſe.

THE leſſor of the Plaintiff claimed the premiſſes in queſtion under a leaſe from one *Andrews*, who had ſince become a bankrupt. The Defendant alſo claimed under a leaſe from *Andrews*; but the leaſe granted to him was of a date ſubſequent to that under which the leſſor of the Plaintiff claimed.

There being an ambiguity in the words of the firſt deed, the Defendant called *Andrews* as a witneſs, to prove that the premiſſes in diſpute were not included in the premiſſes demiſed by that deed.

On an objection being made to his competency, Lord *Kenyon* ſaid, that as he had parted with the reverſion, by the aſſignment under the commiſſion, he was an admiſſible witneſs; but that he ſhould have

thought him incompetent, had he ſtill been intitled to the reverſion.

He was accordingly (after releaſing his allowance and ſurplus) permitted to give evidence; and on his evidence the Defendant obtained a verdict. (*a*)

(*a*) *Vide Bell* v. *Harwood*, 3 *Term Rep.* 308.

HARRIS *v.* WATSON.

No action will lie at the ſuit of a ſailor on a promiſe of the captain to pay him extra wages in conſideration of his doing more than the ordinary ſhare of duty in navigating the ſhip.

IN this caſe the declaration ſtated, that the Plaintiff being a ſeaman on board the ſhip *Alexander*, of which the Defendant was maſter and commander, and which was bound on a voyage to *Liſbon*: whilſt the ſhip was on her voyage, the Defendant, in conſideration that the Plaintiff would perform ſome extra work, in navigating the ſhip, promiſed to pay him five guineas over and above his common wages. There were other counts for work and labour, *&c.*

The Plaintiff proved that the ſhip being in danger, the Defendant, to induce the ſeamen to exert themſelves, made the promiſe ſtated in the firſt count.

Lord KENYON. If this action was to be ſupported, it would materially affect the navigation of this kingdom. It has been long ſince determined, that when the freight is loſt, the wages are alſo loſt. (*a*) This rule was founded on a principle of policy, for if ſailors were in all events to have their wages, and in times of danger intitled to inſiſt on an extra charge on ſuch a promiſe

(*a*) *Herman* v. *Bawden & al'*, 3 *Bur.* 1844. *Abernethy* v. *Landale*, *Doug.* 520.

as this; they would in many caſes ſuffer a ſhip to ſink, unleſs the captain would pay them any extravagant demand they might think proper to make.

The Plaintiff was nonſuited.

FARISH *v.* WILSON.

Tueſday, 19 July, At Weſtminſter.

No action at law lies for a legacy.

ASSUMPSIT for money had and received.

It was brought to recover a ſum of 250*l.* Bank-ſtock, being a legacy left to the Plaintiff's wife. The Defendant was the agent of the Plaintiff, and had, as ſtated by the Plaintiff, received the money.

Lord KENYON. Had this action been againſt the truſtee or executor, I am clearly of opinion it could not be maintained. It is true there was one caſe, where it was ſaid, that an action would lie for a legacy, but the very Judges who determined that caſe had *more than a doubt* upon their minds afterwards. And it is highly convenient and beneficial that courts of equity ſhould have the ſole juriſdiction in theſe caſes. Thoſe courts make proviſion for children, infants, married women, *&c.* according to the ſituation of the parties and circumſtances of the caſe; whereas a court of law can only proceed according to the ſtrict rules of law, without at all conſulting the convenience of the parties. This is not the preſent caſe, I only took this opportunity of delivering my opinion, leſt it ſhould be thought that I was of opinion that in any caſe an action at law would lie for a legacy.

The

The Plaintiff not proving the caſe ſtated was non-ſuited. (*a*)

(*a*) *Vide Atkins & Hill*, Cowp. 284. *Hawkes & Sanders*, *ibid.* 289. *Roſe & Wife* v. *Bowler*, 1 *H. Black.* 109. *Deeks & Wife* v. *Street*, 5 *Term Rep.* 690. *Nicholſon* v. *Shirman*, 1 *Sid.* 45. *Sir. T. Raym.* 23.

WORRAL *v.* HAND Adminiſtratrix.

Money received by an executrix for the good-will of a publick houſe is aſſets in her hands.

ASSUMPSIT for goods ſold and delivered, *&c.*

Pleas *non aſſumpſit*, *plene adminiſtravit*, and bonds outſtanding.

The Plaintiff proved that the inteſtate was a publican, and that for ſome time after his death the defendant lived in the houſe, and afterwards ſold the good will of the trade for a ſum of money.

On an objection by the Defendant's counſel, that this money was not aſſets in the hands of the Defendant,

Lord KENYON ſaid, it was aſſets in her hands; though ſhe was tenant at will after the death of the inteſtate. In the Court of Chancery, his Lordſhip ſaid, it was the daily practice to conſider all beneficial intereſts, ſuch as renewable leaſes and the like, as aſſets, and to charge the repreſentative with the money ariſing from them, and this was analogous to thoſe caſes.

The Defendant proving her plea of *plene adminiſtravit*, the Plaintiff took a verdict on the general iſſue, and the other iſſues were found for the Defendant.

The KING *v.* PEARCE.

Tueſday, July 21ſt. At Weſtminſter.

THIS was an information againſt the Defendant for a libel on the Duke of *Athol*, on his petitioning parliament reſpecting the *Iſle of Man*.

To prove the Defendant author of a libel, evidence of other libels written by the ſame perſon and concerning the ſame ſubject may be received.

To prove the Defendant the editor of the paper and author of the libel, *Luxford* the printer was called. He ſwore that he received the manuſcript of the libel from the Defendant, and returned it to him (*a*). To corroborate the teſtimony of this witneſs, the proſecutor offered to give in evidence ſeveral paragraphs (written by the Defendant concerning the proſecutor and the *Iſle of Man*) which were not ſtated in the information.

On an objection to this evidence,

Lord KENYON ſaid, that though theſe were ſeveral and diſtinct offences, yet they might be received as evidence to corroborate the teſtimony of *Luxford*, and ſhew the Defendant to be the author of the preſent libel.

A copy of a newſpaper may be read in evidence, though not ſtamped according to act of parliament.

The witneſs then produced his copy of the paper which he had filed, but which was not ſtamped, and ſwore that the public newſpaper called *The Morning Herald* (of which that was a copy) was publiſhed to the world in the ordinary way.

To prove the publication of a newſpaper it is not neceſſary to produce a copy which has been actually publiſhed.

Two objections were made to this evidence; firſt, that the copy produced was not ſtamped. Secondly, that a paper which had been actually publiſhed to the world ſhould be produced.

(*a*) Notice had been given to the Defendant to produce it.

Lord

Lord KENYON. This is not like the caſe of deeds and agreements, where the acts of parliament expreſsly declare that no ſuch inſtruments ſhall be read in evidence until ſtamped. Though the publiſher of a paper would be liable to a penalty, for not getting the paper ſtamped before publication, yet it may be given in evidence. The publication of the paper is ſufficiently proved by the evidence of the witneſs, who ſays that it was publiſhed in the uſual way.

Proof of delivery of a paper to the ſervant of the Defendant is not of itſelf ſufficient to enable the proſecutor to give parol evidence of it.

On the further examination of *Luxford*, it appeared that he had not delivered the original manuſcript to the Defendant himſelf, but that he had delivered it to his own ſervant, who proved that he had delivered it to the ſervant of the Defendant.

Lord KENYON ſaid this was not ſufficient evidence to enable the proſecutor to give parol evidence of the exiſtence of the paper, there was therefore no ground for conſidering the Defendant as the *author* of the libel. The only remaining queſtion was whether he was proved to be the editor of the paper or not.

The Jury found the Defendant guilty.

VALENTINE *v.* VAUGHAN.

Tueſday, July 26th. *At Guildhall.*

A ſchoolmaſter buying books and ſhoes, and ſelling them at an advanced price to his ſcholars, is not a trader within the bankrupt laws.

TRESPASS for taking goods.

Juſtification as meſſenger under a commiſſion of bankrupt.

The only queſtion in the cauſe was, whether the Plaintiff was a trader within the bankrupt laws. He was a ſchoolmaſter, and *as ſuch* had bought ſchool-books

books to the amount of 30 or 40 *l.* annually, which he retailed to his ſcholars at an advanced price. He alſo bought ſhoes, and ſupplied his ſcholars with them at a profit.

Lord KENYON was clearly of opinion that this was no trading within the bankrupt laws: wherefore the Plaintiff had a verdict.

DU BARRE *v.* LIVETTE.

Wedneſday, July 27th. At Guildhall.

An interpreter who is preſent at converſations between a foreigner and his attorney is bound to the ſame ſecrecy as the attorney himſelf, and ought not to divulge the facts confided to him *after* the cauſe for the purpoſe of which the confidence was placed, is at an end.

THIS was an action of trover for jewels *&c.* which had been ſtolen from the Plaintiff's houſe in *France.*

The Defendant was one of the robbers, and had been indicted at the *Old Bailey* for the theft, but it appearing that the robbery was committed in a foreign country, he was acquitted.

Previous to the trial at the *Old Bailey* he had ſeveral converſations with his attorney (*Croſsley*) but the Defendant being a *Frenchman*, and *Croſsley* not underſtanding that language, it was found neceſſary to have an interpreter, which office was performed by a man of the name of *Rimond.*

Rimond was now called as a witneſs, to prove that the Defendant at thoſe meetings admitted that he had ſtolen the diamonds *&c.* and had no property in them. Immediately the witneſs diſcovered the wickedneſs of the tranſaction, he abandoned the Defendant.

The

The Defendant's counſel objected to *Rimond* being permitted to give this evidence, contending that this was a confidence which ought not to be broken.

Garrow, for the Plaintiff, argued that this evidence ought to be admitted. No confidence was repoſed in *Rimond*, he was merely the organ which conveyed the ſentiments of the Defendant to his attorney, and thoſe of the attorney to the Defendant. When he had done this, his duty was over, and he had no further concern with the Defendant. A caſe much ſtronger than this, he ſaid, had been lately determined by Mr. Juſtice *Buller* on the Northern circuit. That was a caſe in which the life of the priſoner was at ſtake. The name of it was The *King* v. *Sparkes*. There the priſoner being a papiſt had made a confeſſion before a proteſtant clergyman, of the crime for which he was indicted, and that confeſſion was permitted to be given in evidence on the trial, and he was convicted and executed. The reaſon againſt admitting that evidence was much ſtronger than in the preſent caſe; there the priſoner came to the prieſt for ghoſtly comfort, and to eaſe his conſcience oppreſſed with guilt. Beſides in this caſe the confidence, if any was repoſed, was at an end. The confidence was merely as it reſpected the trial then coming on, without any reference to this cauſe which was not then thought of, and ſuppoſing it could not be given in evidence on that trial, ſtill it is admiſſible on the preſent, when the purpoſe for which it was given is at an end.

Lord KENYON. It is ſufficient for me, ſitting here, to ſay that this caſe materially differs from that cited, but

but I ſhould have pauſed before I admitted the evidence there admitted. The caſe, as it reſpects the Judge who determined it, is intitled to every attention from me: but this caſe differs from it. The Popiſh religion is now unknown to the law of this country, nor was it neceſſary for the priſoner to make that confeſſion to aid him in his defence. But the relation between attorney and client is as old as the law itſelf. It is abſolutely neceſſary that the client ſhould unboſom himſelf to his attorney, who would otherwiſe not know how to defend him. In a caſe like the preſent it is equally neceſſary that an interpreter ſhould be employed: every thing ſaid before that interpreter was equally in confidence as if ſaid to the attorney when no interpreter was preſent; he was the organ through which the priſoner conveyed information to the attorney, and it is immaterial whether the cauſe for the defence of which the converſation paſſed is at an end or not, it ought equally to remain locked up in the boſoms of thoſe to whom it was communicated. His Lordſhip confeſſed he ſpoke with ſome doubt, but as the Plaintiff had other witneſſes to call, he wiſhed this evidence not to be received, leſt a new trial ſhould be granted on account of his having improperly received it.

The witneſs was permitted to reveal ſuch converſation as he had with the Defendant in the abſence of *Croſsley*.

The Plaintiff obtained a verdict (*a*).

(*a*) *Vide Cobden* v. *Kendrick*, *ibid.* 753. and *Duffin* v. *Smith*, 4 *T. Rep.* 431. *Wilſon* v. *Raſtal*, *poſt*.

Thurſday, July 28th. At Guildhall.

BAKER and Others *v.* CHARLTON.

If ſeveral perſons trade under a particular firm, and ſome, without the concurrence of others, draw bills under that firm, all are liable to an indorſee.

ASSUMPSIT on a bill of exchange by the indorſees againſt the Defendant as one of the drawers, the other drawers having become bankrupts.

The bill was drawn in the firm of "*James King* and Co." under which firm the Defendant and his partners had traded. It alſo appeared that there were other partnerſhips carried on under the firm of "*James King* and Co." in which the other drawers were concerned, but in which the Defendant had no ſhare. The Defendant offered to ſhew that this bill was not drawn on account of the partnerſhip in which he was concerned, but on account of one of the others; and that he knew nothing of it.

Lord KENYON was of opinion that the Defendant was nevertheleſs liable; he had traded with the other partners under that firm, and perſons taking bills under it, though without his knowledge, had a right to look to him for payment. His Lordſhip ſaid it was an imprudent thing for a man to enter into partnerſhip with any perſon unleſs he had the moſt implicit confidence in his integrity. He remembered *Lord Mansfield* mentioning a caſe where a gentleman of great fortune had lent a ſum of money to a houſe, and was to receive intereſt according to the profits of the buſineſs, he had no idea, at the time, that this conſtituted him a partner, but it was ſo determined, and he was abſolutely ruined, though he never intermeddled

meddled in the management of the buſineſs (*a*). *One partner may pledge the credit of the other to any amount* (*b*).

(*a*) *Vide* 2 *Black.* 1001. (*b*) *Vide Willet* v. *Chambers, Cowp.* 814.

WHITE *v.* BOULTON and Others.

The proprietors of a mail coach are anſwerable for any injury happening to a paſſenger thro' the miſconduct of their driver.

THIS was an action againſt the Defendants, who were proprietors of the *Cheſter* mail coach, for the negligence of the driver, by reaſon whereof the coach was overturned, and the Plaintiff's arm broken. The action was in *aſſumpſit*; the declaration ſtated that the Defendants were proprietors of the coach, and that in conſideration the Plaintiff had paid them three guineas for his carriage, they undertook to carry him ſafely *&c.*

The Plaintiff having proved his caſe, *Mingay*, for the Defendants, ſaid that he was told a caſe of *Harris* and *Wilſon* had been tried before Lord *Loughborough* at the *Common Pleas Sittings* after *Eaſter Term* laſt, in which his Lordſhip had held that the proprietors of a mail coach were not anſwerable for the negligence of their ſervants; ſaying that thoſe coaches were not under the government of the proprietors, but the concern of the Public, being eſtabliſhed merely for the conveyance of letters; and therefore if any perſon travelled in them, he went at his own riſque, and the law implied no promiſe for his ſafety.

Lord KENYON ſaid he was certain that no ſuch determination had ever been made by Lord *Loughborough.*

rough. It was too abſurd to enter into the head of any man. Doubts had been entertained by great lawyers in the laſt and beginning of the preſent century, whether the poſt-maſter general was liable for letters ſent (*a*). He would not deliver any opinion on that point, as it had nothing to do with the preſent caſe; for when theſe coaches carried *paſſengers*, the proprietors of them were bound to carry them ſafely and properly.

The Plaintiff had a verdict, and 60 *l.* damages.

(*a*) See *Lane* v. Sir *Robert Cotton* and Another, 1 *Lord Raym.* 646. *&c.* This queſtion was laid at reſt by the caſe of *Whitfield* v. *Lord Le Deſpencer et al'*, *Cowp.* 754. where it was determined that no action would lie againſt any member of the poſt-office, unleſs he has been *perſonally* negligent.

PHILP *v.* SQUIRE.

No action lies for harbouring the Plaintiff's wife where ſhe is kept by the Defendant from a principle of humanity, to ſecure her from the ill treatment of her huſband.

THIS was an action on the caſe for harbouring the Plaintiff's wife after notice from the Plaintiff not to do ſo.

It appeared that the Plaintiff's wife came to the houſe of the Defendant (to whoſe wife ſhe was related) and *repreſented herſelf* to have been very ill uſed by her huſband, who, ſhe ſaid, had turned her out of doors. Upon this repreſentation the Defendant received her into his houſe, and, at her requeſt, ſuffered her to continue there after he had received notice from the huſband not to harbour her. It was not proved that the huſband had in fact ill treated his wife.

Lord KENYON. The ground of this action is that the Defendant retains the Plaintiff's wife againſt the inclination

inclination of her husband, whose behaviour he knows to be proper; or from selfish and criminal motives. But where she is received from principles of humanity the action cannot be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a married woman. It is of no consequence whether the wife's representation was true or false. This kind of action materially differs from that for harbouring an apprentice, the ground of the action in that case being the loss of the apprentice's service.

The Plaintiff was nonsuited.

ROBERTS and Another, Assignees &c. v. DOXON.

Monday, August 1st. At Guildhall.

THIS was an action of trover brought by the Plaintiffs to recover a quantity of goods which they contended had been delivered to the Defendant by the bankrupt *Cooke* in contemplation of bankruptcy.

Though a witness cannot give evidence of the *particular contents* of *written* accounts, yet he may speak to the *general balance* without producing them.

The bankrupts were *Cooke* and *Kilner*. *Cooke* was also partner in another house with one *Wilkinson*, and two commissions had issued, one against *Wilkinson* and *Cooke*, the other (under which the Plaintiffs were chosen assignees) against *Cooke* and *Kilner*.

One of the assignees under the commission against *Wilkinson* and *Cooke* was called as a witness, to prove that *Wilkinson* and *Cooke*'s debts, a little time before their bankruptcy, amounted to a much larger sum of

money than their credits. He produced no papers, but ſaid he collected his information from having inſpected their accounts.

Lord KENYON thought that though he could not ſtate the particulars of the books without producing them, yet that he might ſpeak to the general amount, not by ſaying that one page was ſo much and another ſo much, but what from his general obſervation he perceived to be the general ſtate of their accounts.

Verdict for the Plaintiff.

ROTHEROE and Others *v.* ELTON.

An owner of a ſhip is not a witneſs in an action on an inſurance of goods put on board that ſhip until releaſed by the Plaintiff.

ASSUMPSIT on a policy of inſurance on the Plaintiffs' goods on board the ſhip *Jeſſe* of *Port Glaſgow*.

The queſtion in the cauſe was merely a matter of fact, whether the ſhip was ſea worthy or not.

The Plaintiffs called the owner of the ſhip as a witneſs to prove that ſhe was ſtaunch.

Erſkine objected that he was intereſted in the event of the cauſe, he comes to exonerate himſelf from the action, which the Plaintiffs will have againſt him if they fail in this action: for the law would imply a warranty on his part that the ſhip was ſtaunch.

Gibbs, for the Plaintiff, anſwered that it was determined in the caſe of *Bent* and *Baker* (*a*) that a wit-

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(*a*) 3 *Term Rep.* 27.

neſs

neſs was competent in all caſes, except where the verdict to be given in the cauſe would be evidence for or againſt him, and that the verdict in the preſent cauſe could not be evidence in an action by or againſt the owner.

Lord KENYON. The caſe of *Bent* and *Baker* was determined on ſound principles, but it was there held that the witneſs was incompetent, not only in thoſe caſes where the verdict in the cauſe would be evidence for or againſt him in another ſuit, but alſo where he was directly intereſted in the event of the ſuit. This witneſs is directly intereſted in the manner mentioned by Mr. *Erſkine*.

The Plaintiff then releaſed the witneſs, and recovered a verdict. (*a*)

(*a*) In a cauſe of *Fox* v. *Luſhington*, tried before his Lordſhip at *Guildhall*, at the *Sittings* after *Hillary Term* 35 *Geo.* 3. a ſimilar objection was made to the depoſition of *Barry* the maſter and ſole owner; and no releaſe being offered his depoſition was not read.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM

32 GEORGE III. 1791.

Tueſday, Nov. 29, 1791. At Weſtminſter.

HALL *v.* ELLIOT, Executor of ELIZABETH CODDON, Widow, who was the Executrix of her late Huſband PATRICK CODDON, deceaſed.

A man who poſſeſſes himſelf of the effects of the deceaſed under the authority, and as agent for the rightful executor, cannot be charged as executor *de ſon tort.*

ASSUMPSIT for goods ſold and delivered to the teſtator *Patrick Coddon* in his life-time.

The Defendant pleaded that the teſtator *Patrick Coddon* made his will and appointed *Elizabeth Coddon* and *Rowland Conyers*, executrix and executor thereof, that they both proved the will, and afterwards *Elizabeth Coddon* died, and that *Rowland Conyers* was ſtill alive. And the Defendant further ſays, "that he never did, as the executor of the ſaid *Elizabeth Coddon* who was the executrix of the ſaid *Patrick* as aforeſaid, adminiſter any goods or chattels &c."

The

The Replication traverſed this laſt averment.

Lord KENYON ſtop'd the counſel upon the opening of the pleadings, and ſaid he thought this action could not be maintained. Here is a ſurviving executor who has acted, and he alone is anſwerable. If the Defendant has poſſeſſed himſelf of any goods, he is anſwerable to the ſurviving executor for them, and that executor muſt diſtribute them amongſt the creditors.

Wigley for the Plaintiff, cited *Read*'s caſe, 5 *Co.* 33. which he contended ſhewed that this action might be ſupported, though he admitted that an action would alſo lie againſt the Defendant at the ſuit of *Conyers* the ſurviving executor; and Mr. *Bower*, who was alſo of counſel for the Plaintiff obſerving that the objection was on the record, Lord *Kenyon* ſaid he would permit the cauſe to go on, though he had no doubt in his own mind that the action could not be maintained, as it was impoſſible there ſhould be a lawful executor, and an executor *de ſon tort*, at the ſame time. (*a*)

The cauſe accordingly proceeded, but *Conyers* the ſurviving executor proving that the Defendant acted

(*a*) In the ſecond reſolution in *Read*'s caſe it is ſaid, that if an executor is made, and proves the will, and then a ſtranger takes goods *claiming them for his own*, he is not executor of his own wrong; becauſe *there is another executor* whom the creditor may charge: but although there be an executor who adminiſters, yet if a ſtranger takes the goods and *claiming to be executor*, pays debts &c. he may for ſuch *expreſs* adminiſtration be charged as executor of his own wrong. The third reſolution was that where the Defendant takes the goods *before* the rightful executor hath taken upon him or proved the will, he may be charged as executor of his own wrong.

as agent for him, and accounted with him, for the money he received, the Plaintiff was nonſuited.

Wedneſday, November 30, *At Guildhall.*

If *A* be indebted to ſeveral perſons in different ſums of money, and when they are all aſſembled together, tenders them *one groſs ſum*, ſufficient to ſatisfy all their demands, which they refuſe to receive, *inſiſting on more being due*, this is a good tender. It is not neceſſary to produce the money tendered when the creditor inſiſts on more being due.

BLACK *v.* SMITH.

THIS was an action of *aſſumpſit* on a ſpecial promiſe to pay the Plaintiff (a mariner) more than the ordinary wages in conſideration of his undertaking a voyage from *Hambro'* to *Newcaſtle.*

The Defendant had pleaded a tender, and paid money into court ſufficient to cover the ordinary wages.

It appearing that this promiſe was extorted from the Defendant by the mutinous conduct of the mariners; this part of the caſe was given up (*a*), and the only queſtion was, whether a legal tender had been made. The like promiſe had been made to the other ſailors, as to the Plaintiff, and ſeveral of them had alſo brought actions againſt the Defendant; but before the commencement of the preſent action, the Plaintiff and ſeveral other ſailors being in the ſame room, the Defendant offered them as much money as was ſufficient to pay all the crew their legal wages, but did not diſtinguiſh the particular ſum due to each. The amount of the whole money offered was about 11*l.* the debt due to the Plaintiff 1*l.* 5*s.* All the ſailors preſent refuſed to receive leſs than the money promiſed them, and upon hearing this their re-

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(*a*) *Vide Harris* v. *Watſon, ante* 72.

ſolution,

ſolution, the Defendant did not produce the money, which he had ready to pay them.

Garrow for the Plaintiff, objected that this was not a good tender, he ſaid this was like the caſe of a Bank note of 500 *l.* being tendered to pay a debt of 100 *l.* and the change being demanded. This would ſurely not be a good tender.

Lord KENYON. This is true in part, though not wholly ſo. I take it to be clear beyond a doubt, that if the debtor tenders a larger ſum of money than is due, and aſks change, this will be a good tender, if the creditor does not object to it *on that account*, but only demands a larger ſum. I think that the tender made in this caſe was a good one, they were told there was enough to pay all, and they objected to receive it, becauſe they wanted more. There is no occaſion to produce the money if the creditor refuſes to receive it on account of more being due.

Verdict for the Defendant. (*a*).

(*a*) *Vide Wright* v. *Reed*, 3 *Term Rep.* 534. *Douglas* v. *Patrick*, *ibid.* 683, and *Cole and Another* v. *Blake*, *poſt*.

WHITE *v.* EDMUNDS and Others.

Thurſday, Dec. 1ſt. *At Weſtminſter.*

If when a man is apprehended, and in the cuſtody of officers of juſtice, a third perſon eſpouſes his cauſe and encourages the priſoner to reſiſt, the officers may impriſon ſuch third perſon.

ASSAULT and falſe impriſonment.

The Defendants juſtified the impriſonment on account of the Plaintiff having made a noiſe and affray.

It

It appeared, that one *Weeks* was walking along the *Strand* by the Defendant *Edmund*'s door between 11 and 12 o'clock at night, and there ſpoke to a woman who retreated back and claimed the protection of the Defendant *Edmunds*. That *Edmunds* thereupon ſpoke to *Weeks*, deſiring him to walk on and not inſult the woman; but he, inſtead of attending to this deſire, anſwered *Edmunds* with abuſive language calling him ſcoundrel, *&c.* and collecting a croud about his houſe, on which *Edmunds* charged the watch with *Weeks*. While the Defendants were conveying *Weeks* to the watch houſe, the Plaintiff came up and intereſted himſelf in his cauſe. He, with others, went into the watch-houſe, and was there ſome time uſing abuſive language to the Defendant *Edmunds*: they at length came to very high words; and the Plaintiff was deſired to go out of the watch-houſe; *Weeks* put his back againſt the door, and in a riotous manner inſiſted on his being permitted to ſtay; and the Plaintiff continuing his abuſe, *Edmunds* alſo charged the other Defendants (who were the watchmen) with him.

Lord KENYON was of opinion, that theſe facts afforded a ſufficient juſtification of the Defendants' conduct. When a man is in the cuſtody of the officers of juſtice no other perſon has a right to interfere. If the Defendants apprehended *Weeks* for a juſt cauſe, he ſhould have been left to them, and they not interrupted in the execution of their duty; if he was taken illegally, the officers muſt anſwer it at their peril. In the preſent caſe the Plaintiff had entered into the cauſe of *Weeks*, he therefore made himſelf liable for any miſconduct of *Weeks*. *Weeks* himſelf made a riot by ſhutting the door and inſiſting on the Plaintiff being per-

permitted to ſtay, and the Plaintiff encouraged him in it.

The jury found a verdict for the Defendant.

REX *v.* BARTHOLOMEW NEVILLE.

Friday, Dec. 2.

A bond given by the Defendant acknowledging himſelf to be guilty of a nuiſance, is good evidence on the trial of an indictment for a nuiſance, in carrying on the ſame buſineſs in another place.

A man ſetting up a noxious buſineſs in a neighbourhood where ſuch buſineſs has long been carried on, is not indictable for a nuiſance, unleſs the noxious vapour is *much* increaſed by his manufacture.

THIS was an indictment for a nuiſance in carrying on the buſineſs of a melter of kitchen ſtuff and other greaſe.

Amongſt other evidence, the proſecutor produced a bond from the Defendant to the pariſh officers of the place where he before reſided, acknowledging that the trade he carried on was a nuiſance, and binding himſelf not to continue it. To lay a foundation for this evidence, the proſecutor had before proved, that the trade was carried on in the ſame manner at the place where he now was, as at his former reſidence.

Erſkine for the Defendant objected to this evidence. What is a nuiſance is a queſtion of law mixed with fact. The Defendant may have acknowledged himſelf guilty of a crime which the fact would not conſtitute (*a*), and what may be a nuiſance in one place will not be ſo in another.

Lord KENYON. Certainly what is a nuiſance in one ſituation is not ſo in another. In places where offenſive trades have been long carried on they are not nuiſances, though they would be ſo in any of the

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(*a*) *Vide* 1 *Burr.* 267.

ſquares,

ſquares, or other places where ſuch trades have not been exerciſed. But the Defendant having acknowledged himſelf guilty of a nuiſance in another place, cannot object to this evidence, which will weigh more or leſs againſt him, as it ſhall appear this place is more or leſs like that where he before reſided.

The evidence was therefore received.

Upon the whole of the evidence it appeared, that there had been manufactories, which emitted diſagreeable and noxious ſmells, carried on in this neighbourhood for many years; and that the Defendant came into the neighbourhood about four years ago. There was contradictory evidence as to the fact of the ſtench being much increaſed by the Defendant's melting houſe; ſome of the witneſſes for the Crown ſtating it to have made the neighbourhood much more uncomfortable; thoſe on behalf of the Defendant ſaying the difference was ſcarcely perceptible.

Lord KENYON left it to the jury to conſider whether the noxious vapour was much increaſed by this addition of the Defendant. Where manufactories have been borne with in a neighbourhood for many years, it will operate as a conſent of the inhabitants to their being carried on, though the law might have conſidered them as nuiſances, had they been objected to in time; but if another man comes, and, by *his* manufacture, renders that which was a little unpleaſant before, very diſagreeable and uncomfortable, though it would not amount to a nuiſance by itſelf, ſtill he is anſwerable for it.

The Defendant was acquitted.

Note,

Note. *Samuel Neville*, the brother of the Defendant, was alſo indicted, but it appearing that the manufacture had been carried on near 50 years by the Defendant's father and himſelf; Lord *Kenyon* directed the jury to find the Defendant not guilty, which they did.

LAWRENCE *v.* WORRALL.

TO an action of *aſſumpſit*, the Defendant pleaded the ſtatute of limitations.

The Defendant ſaying to the Plaintiff "what an extravagant bill you have delivered me," is a ſufficient acknowledgment to avoid the ſtat. of limitations.

The Plaintiff's witneſs proved, that in the month of *February* laſt, juſt after the bill in queſtion was delivered; the Defendant meeting the Plaintiff, ſaid to him, "what an extravagant bill you have delivered "me," on which the Plaintiff offered to refer it to arbitration, which the Defendant refuſed.

Lord KENYON held this a ſufficient acknowledgement of *ſome* money being due, to take it out of the ſtatute; and on his Lordſhip giving this opinion, the parties agreed to refer the *quantum* of damages to arbitration (*a*).

(*a*) *Vide Lloyd* v. *Maund*, 2 *T. Rep.* 760.

LAW *v.* WELLS.

Saturday, Dec. 3d.

A party is not obliged to produce evidence againſt himſelf though ſuch evidence is in court, and he has had notice to produce it.

THIS was an action of trover againſt the Defendant, who, as meſſenger under a commiſſion of bankrupt, had taken the Plaintiff's goods.

The

The Plaintiff had given the Defendant notice to produce the proceedings under the commiſſion. They were in Court, but the Defendant's counſel refuſed to produce them.

Lord KENYON ſaid they were not obliged to produce them unleſs they choſe, and mentioned a caſe at *Lancaſter* where Mr. J. *Yates*, who was the leading counſel in the cauſe (*a*), refuſing to produce ſome muniments relating to an election at *Wigan*, the Court held he was not obliged to produce them.

Verdict for Plaintiff.

(*a*) From what Mr. J. *Yates* is reported to have ſaid of this caſe in 4 *Burr.* 2488. it ſhould ſeem that he ſat as *Judge* on the trial of it; he recognized the deciſion, in the caſe of *Roe dem. Haldane and Another* v. *Harvey*, 4 *Burr.* 2484, though his opinion, in that caſe, was over-ruled by that of the other judges; who held that the party ought to produce the deed, though he had not even had notice ſo to do.

ROBINSON *v.* ANDERTON.

In an action for money had and received to recover back money paid to the Defendant, it is not neceſſary to ſhew that he *knew* he was not intitled to receive it.

ASSUMPSIT for *money had and received*. The Plaintiff had ſucceeded the Defendant in a publick houſe, and paid him for ſome fixtures which belonged to the houſe, and were ſcheduled in the original leaſe, and for which the Plaintiff was afterwards obliged to pay the leſſor. The Defendant had been *under-tenant* of the houſe, and had paid the perſon of whom he rented it, for theſe very fixtures.

Piggot on behalf of the Defendant, contended that this action could not be maintained. The preſent De-

Defendant had himſelf paid for theſe fixtures, and of courſe thought he was intitled to ſell them, and as he did not commit any fraud on the Plaintiff, he cannot in this action, be compelled to refund the money.

Lord KENYON. This action imputes nothing criminal to the Defendant, his title is diſaffirmed, for it appears he has received money which he had no right to, and which he muſt therefore return. He may recover back the money from the perſon to whom he paid it, and perhaps tack the coſts of this judgment to it.

Verdict for the Plaintiff. (*a*)

(*a*) *Vide Bree* v. *Holbeck*, *Dougl.* 630.

CARTER *v.* PRYKE.

ASSUMPSIT for uſe and occupation. The Defendant pleaded a tender.

In a queſtion between landlord and tenant whether rent was payable quarterly or half-yearly, evidence of the mode in which *other* tenants paid is not admiſſible.

The only queſtion in the cauſe was, whether the rent was payable quarterly or half-yearly? If the former, the ſum tendered was not ſufficient to anſwer the Plaintiff's demand.

The Plaintiff offered evidence that his other tenants, of the ſame deſcription as the Defendant (who was in indigent circumſtances) paid their rents quarterly.

Lord KENYON. This is clearly no evidence in this cauſe, it has been ſolemnly determined in a trial at bar, that evidence of the cuſtom of one manor is no

no evidence of the cuſtom of a manor adjoining. (*a*).

The Plaintiff produced other evidence and obtained a verdict.

(*a*) See alſo *Furneux* v. *Hutchins*, *Coup.* 807.

FELL *v.* BROWN, Eſq.

Monday, Decem. 5th.

No action lies againſt a barriſter for miſconduct.

THIS was an action againſt the Defendant, a barriſter, for unſkilfully and negligently ſettling and ſigning a bill filed by the Plaintiff in the Court of Chancery, which bill was referred by the Lord Chancellor to the Maſter, for ſcandal and impertinence, and the Plaintiff obliged to pay the coſts of that reference.

Erſkine for the Plaintiff in his addreſs to the jury, ſaid that he ſhould prove this to be *craſſa negligentia*, and not a mere error in judgment. If a counſel gives his opinion on any queſtion, and happens to be miſtaken, it cannot be ſaid that he has been guilty of groſs negligence; but if he is ſo inattentive to his duty as to blunder in the common courſe of buſineſs, he makes himſelf liable to an action, as would alſo a phyſician for ſuch groſs miſconduct.

Lord KENYON was clearly of opinion, that this action would not be ſupported. More objections than one, his Lordſhip ſaid, might be made to it. The Court of Chancery will in ſuch caſes exert a ſummary power, if it is found expedient ſo to do (*a*); but if that court will order the counſel to pay the coſts, it does not follow that an action can be maintained.

(*a*) *Rules and Orders of Chancery* 93. *Mitford's Pleadings* 47.

If

If this action could be ſupported, it would equally lie againſt a counſel for inſerting a count in a declaration, or putting matter in a plea which ought not to be there, and which the court ſhould think improper and impertinent. In a caſe (*a*) where Lord *Weymouth* was a Defendant, the Court thought the declaration full of unneceſſary matter, and ordered it to be ſtruck out, with coſts, but no one ever entertained an idea that an action could be maintained againſt the counſel who drew that declaration. His Lordſhip added, that he believed this action was the firſt, and he hoped the laſt, of the kind.

On this opinion, the cauſe was given up, and the Plaintiff nonſuited without one witneſs being examined; but his Lordſhip told the Plaintiff's counſel he would take a note of that cauſe, that they might move for a new trial, if the thought proper. (*b*)

(*a*) *Cowp.* 665. *ibid.* 737. *Rep.* 317, and *Turner* v. *Philipps*, *poſt.*
(*b*) *Vide Chorley* v. *Balcot*, 4 *T.*

DUBERLY *v.* GUNNING.

Tueſday, Dec. 6th.

THIS was an action for criminal converſation with the Plaintiff's wife.

The Court will put off the trial on the affidavit of *the Defendant's attorney* that a material witneſs is kept out of the way by the Plaintiff.

The cauſe ſtood in the paper for trial this day, and a motion was made by *Bearcroft* for the Defendant to put off the trial on an affidavit, ſtating a ſuſpicion that two of the Defendant's witneſſes were kept out of the way by the Plaintiff. The affidavit was made by the Defendant's attorney, who ſwore that he be-

lieved the witneſſes were material and neceſſary for the Defendant's defence.

Erſkine for the Plaintiff ſaid, that had the queſtion between the parties been a matter of title, which might be purely a queſtion of law, the affidavit of the attorney would have been ſufficient; but that in a caſe like the preſent, which muſt be entirely a queſtion of fact, the Defendant himſelf ſhould ſwear to the materiality of the witneſſes.

Lord KENYON. I think this affidavit is ſufficient. There was once a caſe (*a*) where on a queſtion of identity, on an attainder of high treaſon, the Court, before they would put off the trial, required the Defendant to ſwear that he was not the ſame perſon. How far that caſe was reliſhed at the time the public opinion of it ſince has ſhewn. It has never ſince been conſidered as a precedent, or at all acted under.

The trial was put off.

(*a*) Mr. *Charles Radcliffe*'s caſe, *Foſt. Rep.* 40. 1 *Black. Rep.* 3.

NEW *v.* CHIDGEY.

Friday, December 9th. *At Guildhall.*

A perſon about whoſe houſe work has been done by the Plaintiff, is not a good witneſs to prove that the Defendant is liable, until ſhe is releaſed.

ASSUMPSIT for work and labour done and performed for the Defendant.

The Plaintiff was a Paper-hanger, and had done work in the houſe of a lady of the name of *Le Pein*. She had employed the Defendant, and the queſtion between the parties was, whether the Plaintiff had done this work on the credit of the Defendant, or was to look to Mrs. *Le Pein* for payment of his bill.

The

The Plaintiff propoſed calling Mrs. *Le Pein* to prove that ſhe had employed the Defendant to do the repairs of her houſe for a certain ſum, and that he was to do all the work, and pay all the perſons employed by him, amongſt whom was the Plaintiff.

Erſkine contended ſhe was an admiſſible and competent witneſs, ſhe had no intereſt in the event of the cauſe. If a verdict was given for the Plaintiff, on her evidence, ſhe would not be diſcharged, for ſhe was ſtill liable to an action at the ſuit of the Defendant for money paid to her uſe; and her evidence in this cauſe, or the record in it, would not be evidence for her in that cauſe: ſhe would therefore ſtill be liable to pay the money.

Lord KENYON thought this a direct intereſt in the event of the cauſe. His Lordſhip ſaid he would never wiſh to depart from the rule laid down in *Bent* and *Baker* (*a*), that caſe was determined upon good conſideration and upon true principles, but this did not come within it.

The Plaintiff then releaſed and examined Mrs. *Le Pein*, and on her evidence obtained a verdict.

(*a*) 3 *Term Rep.* 27.

HOLMES *v.* PONTIN.

Monday, Dec. 12th. *At Guildhall.* Where a ſubſcribing witneſs is reſident abroad, evidence of his handwriting is to be given as if he were dead.

ASSUMPSIT for uſe and occupation. The defence was that the Plaintiff had mortgaged the premiſſes, and that the mortgagee had given the Defendant notice to pay his rent to him.

The execution of a leaſe, part of the mortgagee's title, was atteſted by *Gwillando* and *Smith*, the former was maſter of an hotel at *Calais*, the other his waiter.

The clerk to the Defendant's attorney proved, that he had been to *Calais*, and endeavoured to perſuade *Gwillando* to come to *England* and give evidence of the execution of the deed; which he refuſed to do. The witneſs then requeſted him to write his name, which he did in his preſence, and he now ſwore that from his obſervation of his hand-writing at that time he believed the name *Gwillando*, ſubſcribed to the deed as a witneſs of the execution, was his hand-writing. He further proved that he had enquired after *Smith* the other witneſs, and was told by his father-in-law and ſeveral other perſons, that he was dead.

Mingay, for the Plaintiff, objected that this was no legal proof of the deed.

Lord KENYON. When a party is out of the reach of the proceſs of the Court, I think evidence may be given of his hand-writing as if he were dead. This rule was firſt laid down by Lord *Mansfield* in a caſe (*a*) where the ſubſcribing witneſs was gone to the *Eaſt Indies:* it was conſidered as an innovation at the time, but was found to be ſo beneficial that it has ſince been adhered to, and I am inclined to follow it in the preſent inſtance.

The leaſe was therefore read, and a mortgage and aſſignment of it proved, on which the plaintiff was nonſuited.

(*a*) *Cogblan* v. *Williamſon*, *Dougl.* 89.

Note.

Note. Another deed was alſo proved, to which the Plaintiff was a party, and wherein this leaſe was recited; but Lord *Kenyon* ſaid that without that circumſtance he ſhould have thought the other evidence ſufficient.

LAY *v.* HOLOCK.

In an action againſt the owner for not ſafely carrying corn put on board his veſſel, the captain is a good witneſs on having a releaſe from the Plaintiff.

THIS was an action of *aſſumpſit* againſt the Defendant (who was owner of a veſſel) for negligently ſuffering corn, ſent by his veſſel to *London*, to be injured.

The Plaintiff called the maſter to prove that the injury which the corn had received was occaſioned by the veſſel not being ſea worthy. The Plaintiff had releaſed this witneſs.

Mingay, for the Defendant, objected to him as an incompetent witneſs; if he proved the accident to have happened by the cauſe alledged by the Plaintiff, he exonerated himſelf from any liability; whereas if it ſhould turn out that the barge was loſt by the negligence of the maſter, he would be liable.

Lord KENYON. He has no immediate intereſt; the record in this cauſe would not be evidence for or againſt him in an action brought againſt him; and if it ſhould turn out that the ſhip was loſt by the negligence of the maſter, ſtill the preſent Defendant is liable to the Plaintiff. Therefore, taking it either way, he is a witneſs.

His evidence was received, but many witneſſes proving that the veſſel periſhed by the perils of the ſeas, and not on account of any defect, a verdict was given for the Defendant.

MILLER one &c. v. TOWERS.

Tueſday, Dec. 13th.

An attorney cannot maintain an action even for the money out of pocket in a cauſe until he has delivered a bill ſigned.

ASSUMPSIT on an attorney's bill, and for money paid to the Defendant's uſe. The Defendant employed the Plaintiff to bring an action on a wager. At the trial of that cauſe, Lord *Kenyon* thought the wager an illegal one, and nonſuited the Plaintiff. The Defendant complaining of the hardſhip of his caſe, the preſent Plaintiff agreed to take the coſts out of pocket, and brought this action without ever delivering a bill.

Erſkine, for the Plaintiff, contended that he might give this in evidence under the count for money paid.

Lord KENYON. I am clearly of opinion he cannot; if it were ſo, many beneficial conſequences of the act of parliament might be avoided, for by agreeing to take the coſts out of pocket, the attorney might always prevent a nonſuit when the objection was made.

The Plaintiff proved ſome conveyancing buſineſs, but the Defendant having a ſet-off to a larger amount, the Plaintiff was called.

PEPPER *v.* BURLAND.

ASSUMPSIT for work and labour as a carpenter. The Defendant proved that the Plaintiff contracted to do all the carpenter's work neceſſary to be done in a houſe which the Defendant was building, for a certain ſum. It was admitted that the roof of the houſe had been done in a manner different from that ſpecified in the contract, and the Defendant had paid money into court ſufficient to cover the exceſs.

Where a tradeſman agrees to erect any building for a particular ſum of money, and additions are made, the tradeſman is bound by the contract as far as it can be traced, and entitled to go on a *quantum meruit* for the exceſs only.

A plan was produced, and proved by the Plaintiff, wherein the dimenſions of the houſe were ſtated to be 15 feet; but the houſe on which the work was done was 17 feet. It did not appear that the Plaintiff had ever ſeen this plan before he began to work; but the houſe was begun by the bricklayer on the ſcale of 17 feet, before any contract was made with the Plaintiff.

Lord KENYON. I have often declared, and have had the good fortune to have my opinion adopted by Juries, that where ſome additions are made to a building which the workman contracts to finiſh for a certain ſum of money, the contract ſhall exiſt, as far as it can be traced to have been followed, and the exceſs only paid for according to the uſual rate of charging. I think that the Plaintiff has failed in ſhewing the plan by which he contracted to work to be the ſame as that produced. I admit that if a man contracts to work by a certain plan, and that plan is ſo entirely abandoned that it is impoſſible to trace the contract, and ſay to what part of the work it ſhall be applied, in ſuch caſe the workman ſhall be permitted to charge

for the whole work done by meaſure and value, as if no contract at all had ever been made; but in the preſent caſe the contract is not proved to have been wholly abandoned, for it appears that the dimenſions were the ſame when the Plaintiff contracted as they were when the building was finiſhed; the only exceſs was in the alteration of the roof, and money enough to cover that has been paid by the Defendant into court.

Verdict for the Defendant.

Monday, Dec. 19th. At Guildhall.

REX *v.* D' FARIA.

A party to a ſuit who has ſucceeded therein, is a good witneſs on an indictment for perjury committed in the courſe of that ſuit.

THE Defendant was indicted for perjury committed in an anſwer to an allegation in the Prerogative Court of *Canterbury*. The allegation, in anſwer to which the perjury was committed, was exhibited for the purpoſe of revoking the probate of a will of one *De Sylva* made in favour of the Defendant, and obtaining probate of a ſubſequent will. The caſe ſtated on the part of the Plaintiff in that ſuit was, that the Defendant had, after the teſtator's deceaſe, called on the executrix, named in the laſt will for the purpoſe, as he ſaid, of reading it; and had then cut off the name and ſeal of the teſtator with a pair of ſciſſars, and torn off the names of the ſubſcribing witneſſes. This caſe the Defendant denied by his anſwer, but on examination of witneſſes, the Court decreed in favour of the executrix, which decree was affirmed on an appeal to the delegates.

Amongſt

Amongſt other witneſſes in ſupport of the proſecution, the widow, who was executrix and reſiduary legatee in the laſt will, was called; and on an objection being made to her competency,

Lord KENYON ſaid, ſhe had now no intereſt in the event of this proſecution, the eccleſiaſtical court having decreed in her favour, and eſtabliſhed the will under which ſhe claimed. It was true that the Crown might grant a commiſſion of review in caſe the preſent Defendant was acquitted on the merits, but no objection could be made to her teſtimony on that account, for if ſuch a commiſſion was to be granted, the preſent witneſs could not be examined on that cauſe.

The Defendant was convicted (*a*).

(*a*) *Vide Rex* v. *Dalby*, *ante* 12. and *Rex* v. *Pepys*, *poſt*.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM,

32 GEORGE III. 1792.

Wednesday, Feb. 22d. At Weſtminſter.

CLEVELAND Eſq; *v.* WILSON. Eſq.

In an action for the coſts of a frivolous petition againſt the election of a member of Parliament, it is not neceſſary to prove either the Defendant's ſubſcription of the petition, or a demand of the coſts previous to the commencement of the action.

THIS was an action of debt, on the ſtat. 28 *Geo.* 3. *c.* 52. for the coſts of a frivolous petition, preferred by the Defendant againſt the Plaintiff's election as a member to ſerve in parliament.

The Plaintiff proved the Speaker's certificate, and a copy of the entry on the journals of the Houſe of Commons, of the reſolution of the ſelect committee.

Bearcroft for the Defendant objected, that the Plaintiff had not thereby made out his caſe. He contended, thas it was incumbent on him to prove that the Defendant had ſigned the petition, and that the money had been perſonally demanded of him.

Lord

Lord KENYON thought ſufficient evidence had been given. The petition muſt have been ſubſcribed before it would be received (*a*); and the commencement of the action was a ſufficient demand.

But to remove all doubt, the Plaintiff proved a demand, and on that evidence obtained a verdict.

(*a*) See the act, §. 23.

STORT *v.* CLEMENTS.

Thurſday, Feb. 23d. At Guildhall.

A pilot who has the ſteering of a ſhip is liable to an action for an injury done by his *perſonal* miſconduct altho' a ſuperior officer is on board.

THIS action on the caſe was brought againſt the Defendant for running down a brig belonging to the Plaintiff. The brig was run down by a tender, of which the Defendant was pilot and maſter.

By the commiſſion of the maſter, he is entruſted with the navigation of the ſhip under the command of his ſuperior officer.

A witneſs proved that the conſtant practice in the navy was to leave the navigation of the ſhip entirely to the direction and care of the pilot; but he added that if the commanding officer were to direct the pilot to do any particular act, he muſt obey.

Erſkine, for the Defendant, contended that the action was miſconceived, and that if any perſon was liable to an action, it muſt be the lieutenant who was on board, and under whoſe orders the Defendant was.

Lord KENYON ſaid, that though he might be obliged to act in obedience to the orders of the lieutenant, yet if in the preſent caſe the accident had happened

pened through the *Defendant*'s miſconduct, *he* was anſwerable.

The next witneſs proved that the lieutenant had commanded the Defendant to ſteer the ſhip in a particular manner, in conſequence of which command the miſchief was done. Whereupon the Plaintiff was nonſuited.

DUFFIN *v.* SMITH.

Saturday, Feb. 25th. *At Weſtminſter.* An attorney who prepares deeds which are granted on an uſurious conſideration, may be called as a witneſs to prove the uſury.

DEBT on bond conditioned for the payment of 400*l.* and intereſt.

The Defendant pleaded that the bond was given on an uſurious contract.

The Defendant called the Plaintiff's attorney as a witneſs, to prove that the conſideration on which this bond and the mortgage which accompanied it, were given, was uſurious.

It was objected by the Plaintiff's counſel that this was a caſe of confidence, and he could not be examined.

Lord KENYON. The privilege does not extend ſo far as this caſe. Where any thing is communicated to an attorney by his client for the purpoſe of his defence, he ought not to divulge it; but where he himſelf is, as it were, a party to the original tranſaction, *that* does not come to his knowledge in the character of an attorney, and he is liable to be examined the ſame as any other perſon.

Mingay, as *amicus curiæ*, mentioned a caſe of —— v. *Breſt*, at *Guildhall*, where Mr. *Taylor*, who was attorney

torney for one of the parties, was compelled to prove what paſſed at the time of the execution of the deeds; but ſaid he believed the objection was not taken in that caſe.

Mr. *Holdworth*, the Plaintiff's attorney, was then examined, and he clearly proving the uſury, the Plaintiff was called (*a*).

(*a*) *Vide Du Barré* v. *Livette, ante.*

BEAUCHAMP *v.* BORRET.

ASSUMPSIT for money had and received.

Where an annuity is reſcinded after it has been paid for ſome time, the purchaſer is intitled to receive back his *whole* purchaſe-money.

The Plaintiff having purchaſed an annuity of the Defendant, which was void on account of the deeds not being inrolled, it was agreed, after two yearly payments had been made, that the annuity ſhould be reſcinded; and that the Defendant ſhould pay to the Plaintiff the money paid for the purchaſe of the annuity, with intereſt from the laſt yearly payment. The ſum paid for the purchaſe was 600 *l.* The annuity was 100 *l. per annum.*

The only queſtion in the cauſe was, whether under this agreement (which was contained in a letter from the Defendant) the Plaintiff was intitled to recover the whole 600 *l.* with intereſt from the time of the laſt payment, or whether the 200 *l.* which had been paid, ſhould be deducted.

Lord KENYON was of opinion that both under the agreement and according to the juſtice of the caſe, the Plaintiff was intitled to recover the whole 600 *l.* and intereſt, from the time the annuity and the Jury gave damages accordingly.

FALLON *v.* ANDERSON.

Monday, February 27th. At Weſtminſter.

If *A.* be in poſſeſſion of part of a houſe, and *B.* of the other part, and an officer enters into *A.*'s part under a writ againſt *B.*'s goods, *which are not there*, *A.* may maintain an action againſt the officer for breaking and entering his *houſe*, and need not make any new aſſignment to a juſtification under the writ againſt *B.*

TRESPASS for breaking and entering the Plaintiff's houſe, ſeizing goods, *&c.*

The Defendant juſtified under a writ of *diſtringas* againſt one *Staples*, and the Plaintiff replied in the general way, without making any new aſſignment.

On the evidence, it appeared that *Staples* had ſold goods to the value of thoſe in diſpute to the Plaintiff, which ſale could not be impeached, though the Defendant attempted to ſhew it was fraudulent. It was alſo proved that *Staples* had let the ſhop in which the goods in queſtion were; and ſome other rooms in the houſe, to the Plaintiff; and that goods belonging to *Staples*, *which were in a different part of the houſe*, were ſeized by the Defendant at the time the treſpaſs complained of was committed.

Wigley for the Defendant contended, that, as to the treſpaſs for breaking and entering the houſe, the Defendant muſt have a verdict; for he had ſhewn a ſufficient title to enter under the *diſtringas* againſt the goods of *Staples*; and if he alſo entered to ſeize the goods of the Plaintiff, it ought to have been newly aſſigned.

Lord KENYON. By the *houſe* mentioned in the pleadings, we muſt underſtand the ſhop and other part of the houſe in the Plaintiff's poſſeſſion, that was his *domus manſionalis*, and the goods of *Staples* not being *there*, but in another part of the houſe, afford no juſtification of the Defendant's conduct in entering that part, and no new aſſignment is neceſſary.

Verdict for Plaintiff, damages 20*l.* (*a*)

(*a*) *Vide* 3 *Inſt.* 65, and *Hale's Hiſt. P. C.* 556. accord', but ſee alſo *Lee* v. *Gauſel*, *Coup.* 1.

HARRISON *v.* WALKER and Another, Aſſignees, &c.

Tueſday, Feb. 28th, *At Guildhall.*

If *A.* fraudulently procures a bill of exchange from *B.* and afterwards becomes bankrupt and his aſſignees receive the money for the bill, *B.* may recover it from them in an action for money had and received.

THIS action for money had and received, was brought to recover back a ſum of 190*l.* 10*s.* which had been received by the Defendants in payment of bills remitted by the Plaintiff to the bankrupts under the following circumſtances.

The bankrupts, previous to their bankruptcy, had ſent a bill of 193*l.* 17*s.* drawn by themſelves on one *Dawſon*, and purporting to be accepted by him, to the Plaintiff to be diſcounted. The Plaintiff, on the 10th of *November*, ſent bills in return to the value of 190*l.* 10*s.* which arrived in town on the 12th, on which day one of the bankrupts abſconded, the other having gone off on the 10th. It was afterwards diſcovered that the acceptance was a forgery, which the bankrupts knew of, and it was proved that the Defendants had received the money for the bills ſent by the Plaintiff.

Lord KENYON. The aſſignment under the commiſſion paſſes only ſuch property as the bankrupt is conſcientiouſly entitled to. In this caſe the Plaintiff had received no conſideration whatever for the bills by him remitted to the bankrupt; and he is intitled to have the value of them, which the Defendant received, returned to him.

The Plaintiff had a verdict.

Wednesday, February 29th, At Guildhall.

REX *v.* MICHAEL SCHOOLE.

An indictment for perjury, stating a bill of *Middlesex* to have issued *out of the office of the chief clerk* of the Court of King's Bench, is bad.

THIS was an indictment for perjury, alledged have been committed in an affidavit of debt to to hold the prosecutor (*Liscombe Price*) to bail for 250*l.*

The indictment stated the affidavit to have been made before *Booth Braithwaite* (the Signer of the bills of *Middlesex*) to the intent "that the sum of 250*l.* "might be indorsed upon a certain precept called a "Bill of *Middlesex, issuing out of the office of the Chief* "*Clerk assigned to inroll Pleas*, in the Court of our "Lord the King before the King himself."

Mr. *Braithwaite* was called to prove the swearing of the affidavit; and on his cross examination he said, that he was appointed by the three puisne Judges of this Court; and that his was the only office out of which Bills of *Middlesex* issued. That this office was quite distinct from, and unconnected with, the King's Bench office, or office of the Chief Clerk.

Upon this *Shepherd* for the Defendant made two objections. 1st, That there was a material variance between the record and the evidence.

2dly, That taking the fact to be as stated by this record; the person who administered the oath had no authority to administer it, and it was a mere voluntary affidavit.

As to the first objection he said, that by the testimony of the witness it plainly appeared that the writ did not issue out of the King's Bench office as stated in the record. But 2dly, if the record must be taken to be true, it then appeared that *Braithwaite* had no juris-

juriſdiction, for the act of the 12 *Geo.* 1. *c.* 29. directs the affidavit to be made before a Judge of the court out of which the proceſs iſſues; a commiſſioner duly authorized to take affidavits therein, *or the officer iſſuing the proceſs or his deputy*, neither of which had adminiſtered the oath in this view of the caſe; for *Braithwaite* had ſaid, he had no connection with the chief clerk, out of whoſe office the precept was ſtated to have iſſued.

Erſkine and Garrow for the proſecutor anſwered, that the words "the office of the chief clerk aſſigned "to inroll Pleas", were mere ſurpluſage, and being rejected, all would ſtand right. That every court would take judicial notice of its own proceedings, and therefore it muſt appear that the precept iſſued out of the proper office, and that the affidavit was ſworn before a proper officer; for this is a proceſs known to the law, and the witneſs has proved that in fact it was regularly ſued out. That the court would ſee it could not regularly iſſue from the office of the chief clerk; but the *ſubſtance* of the allegation, namely, that that affidavit was made to the intent that a *Bill of Middleſex* might iſſue, was well proved, and that was ſufficient.

Lord KENYON. I am of opinion it would not have been neceſſary to ſtate out of what office the Bill of *Middleſex* was to iſſue (*a*), but the proſecutor having ſtated it to have iſſued out of a wrong office furniſhes a fatal objection. It is impoſſible for me, ſitting here, to ſay that there is not another office out of which

(*a*) It is not uſual to do ſo. See *Dogherty's Cro. Cir. Aſſiſt.* 476.

theſe precepts iſſue. I muſt take it to be as ſtated by the record, which is quite a different proceeding from that proved in evidence. However I will not ſtop the cauſe, but ſave the point, if the proſecutor's counſel ſeriouſly think they can get over the objection.

The proſecutor's counſel were ſo well ſatisfied of the force of the objection, that, on conſulting together, they conſented to an acquittal.

Thurſday, March 1ſt.

CAILIFF and Another *v.* DANVERS.

A warehouſe-man is bound only to take reaſonable and common care of any commodity entruſted to his charge.

ASSUMPSIT againſt the Defendant as a warehouſe-man, for negligently keeping a quantity of *Ginſeng*, which had been depoſited by the Plaintiff in his warehouſe; whereby it had been deſtroyed and ſpoiled.

It appeared that the box containing the *Ginſeng* had been opened, by the Plaintiff's directions, for the purpoſe of ſhewing it to perſons who were about to purchaſe it. That ſeveral perſons looked at it on different days, and every night the lid of the box was ſhut down, but not nailed. That many cats were kept in the warehouſe, and all poſſible care taken to deſtroy vermin, notwithſtanding which the rats had got at the *Ginſeng*, and deſtroyed it.

Lord KENYON ſaid, that a warehouſe-man was only obliged to exert reaſonable diligence in taking care of the things depoſited in his warehouſe. That he was not, like a carrier, to be conſidered as an inſurer, and liable for all loſſes happening otherwiſe than by the

the act of God or the King's enemies; and that the Defendant in the preſent caſe, having exerted all due and common diligence for the preſervation of the commodity, was not liable to any action for this damage, which he could not prevent.

The Plaintiff was nonſuited. (*a*)

(*a*) *Vide Garſide* v. The *Proprietors of the Trent and Merſey Navigation*, 5 *Term Rep.* 581.

MELLISH and Another *v.* MOTTEUX and Others.

Friday, March 2d.

The ſeller of a ſhip is bound to diſcloſe to the buyer all latent defects known to him.

THE firſt count of this declaration ſtated, that in conſideration the Plaintiff would buy of the Defendants a Brig, together with all the rigging, *&c.* belonging thereto; the Defendants undertook and promiſed the Plaintiff that the Brig was free from all latent and concealed defects. The count then ſtated, that ſhe was not free from latent and concealed defects, and that the Defendants at the time of the promiſe *well knew the ſame.*

It was proved, that the Plaintiff bought the Brig "*with all faults*", and not a word was ſaid at the time as to her condition; but that on examination, and taking out the ballaſt, it was diſcovered that 22 of her futtocks were broken, and that had ſhe gone to ſea in that condition, her deſtruction would have been the inevitable conſequence. That this was a *latent* defect, which it was impoſſible for any perſon to have diſcovered in the ſtate the ſhip was at the

time of the purchaſe, and that *the Defendants knew of it.*

Bearcroft for the Defendants objected, that this was a caſe where the rule *caveat emptor* applied, that the Plaintiffs bought the Brig for better for worſe, and could not now get off their bargain.

Lord KENYON. There are certain moral duties which Philoſophers have called duties of imperfect obligation, ſuch as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the higheſt importance that courts of law ſhould compel the obſervance of honeſty and good faith. This was a latent defect which the Plaintiffs could not, by any attention whatever, poſſibly diſcover, and which the Defendants knowing of, ought to have diſcloſed to the Plaintiffs. The terms to which the Plaintiffs acceded, of taking the ſhip with all faults and without warranty, muſt be underſtood to relate only to thoſe faults which the Plaintiffs could have diſcovered, or which the Defendants were unacquainted with.

Verdict for the Plaintiffs. (*a*)

(*a*) *Vide Arnot* v. *Biſcoe*, 1 *Vez.* 95. *Puffendorf L.* 5. *c.* 3. *ſ.* 2, 4, 5. *Grotius L.* 2. *c.* 12. *ſ.* 9.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER EASTER TERM,

32 GEORGE III. 1792.

ADAMS *v.* LINGARD and Another.

Tueſday, May 22d. *At Guildhall.*

ASSUMPSIT on ſeveral bills of exchange by the indorſee, againſt the acceptor.

Q. whether the indorſer of a bill of exchange is an admiſſible witneſs to invalidate it.

The bills were dated at *Madeira*, and not ſtamped. The Defendants called *Carter* the drawer and indorſer to prove, that, though *dated* at *Madeira*, they were in fact *drawn* in *London*, and therefore void for want of a ſtamp.

The Plaintiff's counſel objected to the competency of *Carter*, contending that the indorſer of a bill of exchange could not be a witneſs to deſtroy it.

Lord KENYON ſaid he wiſhed the point to be ſettled in the Houſe of Lords. He was of opinion that the indorſer was a witneſs proper to be heard, but other Judges were of a different opinion. There was

a caſe before Sir *Joſeph Jekyll* many years ago; and another ſince, early in his attendance at *Weſtminſter-hall*, wherein it was determined on a trial at bar (*a*) that three ſubſcribing witneſſes to an inſtrument might be permitted to deny the validity of it.

Carter was accordingly examined, and proved the fact of the bills having been drawn in *London*, and that the Defendants knew of their being ſo drawn.

It was then ſettled that the Plaintiff ſhould tender a bill of exceptions, but the parties not having agreed on a bill, the cauſe came before the Court on *Tueſday* the 26th of *June*, in the following term, when a new trial was granted by conſent. Lord *Kenyon* on that occaſion ſaid, that he adhered to the opinion he had given at the trial. But *per Buller* J. (*b*) This is a very different caſe from that of witneſſes to a will. *Carter* had paſſed this *negotiable* inſtrument to the Plaintiff as a good and valid ſecurity, and it would be attended with conſequences the moſt injurious to ſociety, if theſe ſecurities might be cut down by the perſons paſſing them; it is only for two men to conſpire together and cheat all the world. It is true that the witneſs gives an action againſt himſelf, but that may be a very different ſecurity from that which his evidence deſtroys.

(*a*) *Lowe* v. *Jolliffe*, 1 *Black.* 365. See alſo *Wright dem. Clymer* v. *Littler* and Another, 3 *Burr.* 1244.

(*b*) *Abſente Aſhhurſt*, C. S.

LEE *v.* AYRTON One &c.

Friday, May 25th. *At Weſtminſter.*

In an action againſt an attorney for ſuffering a debtor in cuſtody at the ſuit of the Plaintiff to be ſuperſeded, proof that ſuch debtor was a married woman deſtroys the action, when the declaration ſtates that ſhe was indebted.

Q. Whether a declaration would be good without ſtating that the original Defendant was indebted?

THIS was an action againſt the Defendant for negligence as an attorney in ſuffering *Margaret Cogland*, who was in cuſtody at the Plaintiff's ſuit, to be ſuperſeded for want of proceeding to judgment in due time. The declaration ſtated that *Margaret Cogland* was juſtly and truly indebted to the Plaintiff in a large ſum of money, to wit &c. on promiſes, and that for the recovery of that debt the Plaintiff retained the Defendant &c.

On the part of the Plaintiff *Margaret Cogland* was called as a witneſs, who on her croſs examination ſaid, that at the time of contracting the debt ſhe was a married woman, living ſeparate from her huſband, but without any allowance whatever from him.

Erſkine, for the Defendant, contended that this evidence proved that the Plaintiff had no cauſe of action againſt the Defendant in the firſt action, and therefore that he had ſuſtained no injury by her being diſcharged out of cuſtody.

Mingay, for the Plaintiff, on the contrary inſiſted that the Defendant had been guilty of negligence in ſuffering the original Defendant to be diſcharged without having firſt obtained the conſent of his client, and that he had no right to determine at his own chambers whether the Plaintiff had a good cauſe of action or not.

Lord KENYON. Were the declaration formed to meet the queſtion, it might perhaps bear ſome argument; but this declaration ſets out with ſtating, that

the original Defendant was indebted to the Plaintiff. By the evidence it appears that this averment is not true, ſo that clearly this action cannot be maintained.

The Plaintiff was therefore called (*a*).

(*a*) *Vide Alexander* v. *Macauley* and Another, 4 *T. Rep.* 611. *Aitchiſon* and Another, v. *Madock* and Another, *poſt*.

Wedneſday, May 30th. *At Guildhall.*

HANSON *v.* ROBERDEAU.

Where an auctioneer does not diſcloſe the name of his principal at the time of the ſale, he is perſonally liable to an action for damages for not compleating the contract.

If the conditions of ſale are that a certain ſum *per cent.* ſhall be paid as a depoſit, and the auctioneer accepts a leſs ſum, he cannot afterwards object that too little was paid.

THE Plaintiff had bought a *poſt obit* bond at an auction, where the Defendant acted as auctioneer, and the bond not being aſſigned within the time agreed upon by the conditions of ſale, the Plaintiff brought the preſent action of *aſſumpſit* againſt the auctioneer.

The name of the principal was not mentioned at the time of the ſale, and one of the conditions was, that 25 *l. per cent.* ſhould be paid as a depoſit; but although the Plaintiff was to give 645 *l.* for the bond, only 50 *l.* was paid down, which it was proved the Defendant agreed to accept as a depoſit.

Two objections were taken by the Defendant's counſel. 1ſt. That the agreement was not complied with on the part of the Plaintiff, the whole depoſit money not being paid. 2dly. That the principal, and not the auctioneer, was liable to an action.

Lord KENYON. The Defendant, after having agreed to take 50 *l.* for the depoſit, cannot object that too little was paid. And though where an auctioneer names his principal, it is not proper that he ſhould

ſhould be liable to an action (*a*), yet it is a very different caſe when the auctioneer ſells the commodity without ſaying on whoſe behalf he ſells it; in ſuch a caſe the purchaſer is intitled to look to him perſonally for the completion of the contract.

The Jury found for the Plaintiff, damages 200*l.* which was proved to be the value of the bond over and above the 645*l.* agreed to be given for it.

(*a*) This muſt be underſtood to relate only to an action for damages, for the auctioneer is bound to keep the depoſit until the title is made out, and he is perſonally liable to return it in caſe a good title cannot be made. *Burrough*, Widow, v. *Skinner*, 5 *Burr.* 2630.

CRANCH, Executrix &c. *v.* KIRKMAN and Others.

Where there is a mutual unſettled account and reciprocal demands, the ſtatute of limitations does not attach.
The exception in that ſtatute as to *merchants'* accounts, is not confined merely to perſons of that deſcription.

THIS was an action for goods ſold and delivered by the teſtator, to which the Defendants pleaded the general iſſue, and gave notice of ſet-off for goods ſold and delivered &c.

The Defendants' ſet-off conſiſted of ſeveral *items* for goods, ſold at different times from 1783 to 1788. The Plaintiffs' demand accrued chiefly in the year 1783, but there were two ſmall articles ſold in the year 1789.

It was contended on the part of the Plaintiff that the greateſt part of the ſet-off was within the ſtatute of limitations, no promiſe being proved within ſix

Lord

Lord KENYON ſaid he thought this was within the exception in the ſtatute as to merchants' accounts. He agreed that where the demand of one party ariſes long after the demand of the other, that ſhall not revive the antecedent account, but this was in the nature of a running and *mutual* account between the parties, and was preciſely the caſe put by Mr. J. *Deniſon* in *Cotes* v. *Harris*, which his Lordſhip ſaid he particularly remembered, and of which he believed no one but himſelf had taken a note, the report of it which appeared in print (*a*) having been furniſhed by him.

Mr. *Bearcroft*, for the Plaintiff, contended that this exception extended to no other deſcription of perſons but *merchants*, in which he was over-ruled by Lord *Kenyon*.

The Plaintiff proving a demand beyond the amount of the ſet-off, had a verdict for the balance.

(*a*) *Bull. Ni. Prius*, 149, 50.

TURNER *v.* PHILIPPS, Eſq.

Thurſday, May 31ſt. *At Weſtminſter.*

No action lies to recover back a fee given to a barriſter to argue a cauſe which he did not attend.

ASSUMPSIT for money had and received.

The Plaintiff being a party in a former cauſe, had given the Defendant a brief to attend as one of his counſel on the trial of that cauſe; and the Defendant not having attended the trial, the preſent action was brought to recover back the fee given to him on that occaſion.

Lord KENYON adviſed an agreement between the parties, ſaying, that whether Mr. *Philipps* would chuſe to

to return the fee or not, was for his own conſideration; but if the cauſe was to proceed he ſhould feel himſelf obliged to interpoſe, and the parties might apply to the court, if they were diſſatisfied with his opinion. His Lordſhip alluded to the caſe of *Chorley* and *Bolcot* (*a*), lately decided, and mentioned the general opinion of the Profeſſion, that the fees of Barriſters and Phyſicians, were as a preſent by the client, and not a payment or hire for their labour.

Upon this the parties agreed to ſettle the cauſe out of Court, but *Garrow*, who held a brief for Mr. *Philipps*, ſaid that he had not been guilty of the negligence imputed to him, for that it never was intended that he ſhould attend the cauſe, but the fee was given him as a compliment for the trouble he had taken in the former ſtage of it.

(*a*) 4 *T. Rep.* 317. *Vide Fell* v. *Brown, ante* 96. 3 *Bl. Com.* 28, 9.

DUNLOP *v.* WAUGH.

Friday, June 1ſt. *At Weſtminſter.*

If a man, not knowing the age of a horſe, but having a written pedigree which he received with him, ſell him as a horſe of the age ſtated in the pedigree, at the ſame time ſtating he knows nothing of him but what he has learnt from the pedigree, he is not liable to an action when it appears that the pedigree is falſe.

ASSUMPSIT on a promiſe that a horſe bought by the Plaintiff of the Defendant was only 8 years old when in fact he was 14.

The Defendant when he ſold the horſe ſhewed the Plaintiff a written pedigree, which he had received with him from the perſon of whom he had bought him, and ſaid that he ſold the horſe according to that

pedigree,

pedigree, knowing nothing of him further than he had learnt therefrom, the mark being out of his mouth when he had bought him. The pedigree was clearly proved to be falſe, but the Defendant had no knowledge of this when he ſold the horſe.

Lord KENYON was clearly of opinion that this was no warranty. The Defendant related all he knew of the horſe, and did not enter into any expreſs undertaking that the horſe was of the age ſtated in the pedigree, but ſtated the contents of that which the Plaintiff relied on.

The Plaintiff was nonſuited.

CASS and Another *v.* CAMERON.

A man who has been arreſted is a good witneſs in an action againſt the ſheriff for his eſcape.

THIS was an action on the caſe againſt the ſheriff for permitting one *Whittaker*, againſt whom the Plaintiff had ſued out a *latitat* to eſcape, and returning *non eſt inventus*.

A doubt was at firſt entertained whether *Whittaker* could be a witneſs for the Plaintiff in this cauſe. But afterwards Lord *Kenyon* ſaid, that he ſaw no objection to his competency, for the debt would not be diſcharged by a verdict and judgment in this cauſe, but the witneſs would ſtill remain liable to an action at the ſuit of the Plaintiff.

He was therefore examined, but not making out the caſe, the Plaintiff was nonſuited. (*a*)

(*a*) *Vide Rex* v. *Warden of the Fleet*, *Bul. N. P.* 67.

MEAD *v.* DAUBIGNY.

Wednesday, June 6th. At Guildhall.

In an action for words ſpoken to *A.* concerning the Plaintiff, evidence of words (not in themſelves actionable) ſpoken to *B.* may be received to ſhew the malice of the Defendant.

CASE for ſcandalous words. All the counts in the declaration ſtated the words to have been ſpoken in a *colloquium* with a lady of the name of *Barnſton*, to whom the Plaintiff was about to be married, by reaſon whereof he loſt his marriage, *&c.*

After proving the words by Miſs *Barnſton*, the Plaintiff called another witneſs to prove that the Defendant had, in a converſation with this witneſs, uſed other words.

Garrow for the Defendant, objected to this evidence. He ſaid it was not admiſſible in this action, for all the counts ſtating the ſlander to have been publiſhed to a particular perſon, it would be manifeſt injuſtice to ſuffer the Plaintiff to give evidence of other converſations; for the Defendant comes here to defend himſelf againſt words ſpoken to that perſon only, and had he been aware that other words were to be given in evidence, he might have come prepared to deny or juſtify them.

Erſkine for the Plaintiff, anſwered the objection by ſaying, that no words could be given in evidence which were themſelves actionable, and that the reaſon of that diſtinction was, not becauſe the Defendant might not be able to anſwer them as he otherwiſe would have done, but becauſe the Plaintiff might not have damages for thoſe words, and then bring another action, making thoſe very words the foundation of it. That the only intent in proving ſuch words was to ſhew the *animus* and malice of the Defendant.

Lord KENYON. In actions for words, I have always underſtood that the Plaintiff may give evidence of *any* words uſed by the Defendant, to ſhew the ſpirit and temper by which he was actuated. I muſt own I do not remember any caſe exactly like the preſent, where all the counts ſtated converſations with one particular perſon, and evidence is offered of words ſpoken to another perſon; but I think that I may receive it in this caſe, for the only uſe of it is to ſhew the ſtate of the Defendant's mind and malice towards the Plaintiff. I muſt however requeſt that no evidence may be offered of words, actionable in themſelves, for I am clearly of opinion that ſuch evidence is not admiſſible. (*a*)

The Defendant called no witneſſes, and the Plaintiff had a verdict and 500*l.* damages.

(*a*) *Sed Vide Lee* v. *Huſon, poſt.*

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY TERM

32 GEORGE III. 1792.

ROBSON *v.* HALL.

Thurſday, June 28th. *At Weſtminſter.*

On a wager that *A.* will trot 2 horſes 16 miles in two ſucceſſive hours, he may trot them in any manner he thinks proper.

THIS was an action of *aſſumpſit* on an agreement, whereby the Defendant "betted the Plaintiff "150*l.* to 100*l.* that he did not find two geldings "to trot 32 miles in two ſucceſſive hours, carrying the "ſaid Mr. *Robſon* and no one elſe." It was afterwards, by an indorſement on the agreement, agreed "that the bet ſhould be doubled."

The declaration contained 1ſt, A count on a bet of 300*l.* to 200*l.* 2dly, On the firſt bet of 150*l.* to 100*l.* and laſtly, a count on another bet of 150*l.* to 100*l.* There was but one ſtamp on the agreement and the common breach for non-payment of the money was aſſigned on all the counts.

The Plaintiff performed the trotting within two ſucceſſive hours, but in the following manner, *viz.* he trotted one horſe 12 miles, then trotted the other 4 miles,

4 miles, turned back to the place where he left the firſt horſe, and compleated the match by again mounting that horſe, and trotting him 12 miles more.

Mingay for the Defendant, objected that the Plaintiff had not performed the contract. That it ought to have been performed by trotting each horſe 16 miles, without ſtopping, which was the evident intention of the parties.

Lord KENYON over-ruled this objection, being of opinion, that the true conſtruction of the agreement was that the Plaintiff might trot the two horſes the diſtance, and in the time agreed upon, in any manner he thought proper.

If two perſons by an agreement *in writing*, lay a wager, and then by another agreement, indorſed on the firſt, conſent that the bet ſhall be doubled, there muſt be two 6 s. agreement ſtamps.

Mingay then objected, that there ſhould have been a 6 *s.* ſtamp on each agreement, for that they were diſtinct and ſeparate tranſactions.

But if there is only one ſtamp the winner may recover the firſt bet on a count thereon.

Lord KENYON was of this opinion, but ſaid that as there was a count on each agreement, the Plaintiff might recover one ſum of 150*l.* on the agreement which was ſtamped.

When the cauſe had proceeded ſo far, it appeared that the money betted had been depoſited in a Banker's hands at the time the wager was laid, and a receipt had been given to the Plaintiff and Defendant in their joint names.

Where money betted is paid into the hands of a Banker, who gives a receipt to the perſons betting as received of them; the winner cannot recover on the common count on a wager, but muſt ſtate that the money was ſo paid, and that the Defendant refuſed to permit him to receive it.

On an objection being made that the action ſhould have been brought againſt the ſtake holder,

Lord

Lord KENYON ſaid, It ſhould have been laid in the declaration and proved in evidence, that the money having been paid into the hands of the Banker, the Defendant refuſed to ſuffer the Plaintiff to receive it from him. The money was paid in on their joint account, and one cannot get it from the Banker without the conſent of the other. If the Plaintiff was to recover this money from the Defendant, he might never be able to get it out of the Banker's hands.

The Plaintiff was nonſuited.

SPENCER *v.* GOULDING and Another.

Friday, June 29th, At Guildhall.

THIS was an action againſt the Defendants as common carriers, for not ſafely carrying and conveying a parcel from *Worceſter* to *London*.

A bookkeeper to a carrier is a good witneſs for him without a releaſe.

The queſtion in the cauſe was, whether the parcel was delivered according to the direction or not. The Plaintiff's witneſſes ſwore that it was directed to "*Richard Spencer* to be left at the *White Bear, Piccadilly*, till called for." The Defendants called witneſſes to prove that it was directed to "*Elizabeth Spencer* to be left at the *Black Bear, Piccadilly*", and that it was accordingly left there.

The firſt witneſs they called was their book keeper at *Worceſter*, who was objected to as an intereſted witneſs; and no releaſe was produced.

Lord KENYON thought him a good witneſs, *of neceſſity*, without any releaſe; and he was ſworn and examined.

The cauſe being clearly with the Defendants, they, at the recommendation of Lord *Kenyon*, and in compaſſion to the poverty of the Plaintiff, agreed to withdraw a juror.

Saturday, June 30th. *At Weſtminſter.*

A promiſſory note ſigned by two perſons, and beginning "*I.* promiſe, *&c.*" is *joint and ſeveral.*

MARCH *v.* WARD.

ASSUMPSIT on a promiſſory note made by the Defendant and one *Bowling*, in the following words; *viz.* "I promiſe to pay three months "after date, to *Wm. March*, 8 *l.* 5 *s.* for value re- "ceived in fixtures.

"*Robert Bowling.*
"*Thomas Ward.*"

It was objected, that this promiſſory note was joint only, and not ſeveral.

Lord KENYON. I think that this note, beginning in the ſingular number, is ſeveral as well as joint, and that the preſent action may be maintained on it. I remember a caſe tried before Mr. *Moreton* at *Cheſter* exactly ſimilar to the preſent, wherein I was counſel for the Defendant; I perſuaded the Judge that it was a *joint* note only, and the Plaintiff was nonſuited (*a*), but on an application being afterwards made to this Court, they were of a contrary opinion, and a new trial was granted. The letter *I.* applies to each *ſeverally.*

Verdict for the Plaintiff.

(*a*) *Note.* This is now held to be only matter of abatement, *Cowp.* 832.

HARTLEY *v.* PEHALL.

Quere. Whether a covenant by the leſſee of a public houſe that he and *his aſſigns* will buy all their beer of the Plaintiffs is binding on the *aſſignee.*

THIS was an action of *aſſumpſit* on an agreement to take a public houſe.

At the time the parties were treating about the houſe, the Defendant's appraiſer was proceeding to examine the leaſe, when the Plaintiff ſtopped him, and ſaid he need not trouble himſelf as the leaſe contained nothing but the uſual and ordinary covenants, and *the houſe was a free houſe.* In conſequence of this, the appraiſer deſiſted from further examining the leaſe, and the Defendant entered into the agreement on which the action was brought.

The Plaintiff was not the original leſſee, but the perſons who had aſſigned the leaſe to him were brewers, and had procured a covenant to be inſerted in the aſſignment, that the Plaintiff, his executors, adminiſtrators and *aſſigns*, ſhould deal with them and purchaſe at their brewery, all the beer conſumed in the houſe. No ſuch covenant was inſerted in the original leaſe.

Lord KENYON ſaid, he would not now determine, nor was it neceſſary to do ſo, whether this was a binding covenant on the aſſignee. He thought it a queſtion of ſome nicety, but whether it was or not, he thought it equally a defence to this action. When a man buys any commodity he expects to have a clear indiſputable title, and not ſuch a one as may be queſtionable, at leaſt, in a court of law. No man is obliged to buy a law ſuit.

Verdict for Defendant.

Monday, July 2d.

REX *v.* HUBE and Others.

Parol evidence, of the oaths required by the Toleration Act having been taken, is not admiſſible.

It is not neceſſary to prove the taking of thoſe oaths in an indictment for diſturbing the congregation.

THIS was an indictment on the Toleration Act, 1 *W. & M. c.* 18. for *maliciouſly and contemptuouſly* diſquieting and diſturbing Proteſtant diſſenters in the exerciſe of their religious worſhip.

The prayers were read in *German*, and the congregation was compoſed of Lutherans, ſome of them natives of *Germany*, and the reſt *Engliſhmen* deſcended from *German* parents.

The proſecutor (who was preacher at this meeting-houſe) proved that it was duly regiſtered; and he ſwore, that when the congregation was ſinging the hymns, the Defendants forcibly entered the chapel, pulled the clerk out of the deſk, *&c.* The record of the oaths was produced, and all the formalities required by the ſtatute appeared to have been obſerved, except the declaration, which did not appear on the record. The proſecutor ſwore that he had taken all the oaths.

Lord KENYON ſaid, it was matter of record, and therefore could not be proved by parol evidence, but that he did not think it neceſſary to prove the taking of any of the oaths. The preacher was liable to a penalty for not doing ſo, but it did not diſqualify him from acting.

German Lutherans are within the protection of the Toleration Act.

It is no defence to an indictment on that act, that the Defendant entered the chapel for the purpoſe of aſſerting his right to the clerk's reading deſk.

The proſecutor's caſe being cloſed, *Piggot* for the Defendants ſtated their caſe, which he ſaid was as follows, *viz.* That two of the Defendants were elders of the chapel, and that the third had, till the day on which the fact complained of was committed, been,

and

and acted as clerk thereof. That on that day, the preacher having appointed another clerk, he with ſeveral other perſons, entered the chapel through the preacher's houſe, before the public door was opened, and the new appointed clerk ſeated himſelf in the deſk, the others alſo ſeating themſelves in different pews. That then they began the ceremony, and when they had proceeded through ſome part of it, they opened the public doors, on which the Defendants entered, and requeſted the clerk to leave the deſk, and the others to leave their pews; which they refuſing, the Defendants pulled them out by force.

He contended that the Defendants were entitled to an acquittal on two grounds. Firſt, That this was not a meeting-houſe within the act of parliament. Secondly, That the facts of this caſe did not conſtitute that offence, which it was the object of the ſtatute to prevent.

As to the firſt. Before the Act of Toleration there were many acts of Parliament, all which meant to deſtroy conventicles contrary to the eſtabliſhed church. Theſe were all virtually repealed by the 1ſt of *W. & M.* which act could only have in view the perſons liable to puniſhment under the previous acts of parliament. By the 22 *C.* 2. *c.* 1. it was enacted, "that if any perſon of the age of 16 or upwards, "*being a ſubject of this Realm*, ſhall be preſent at any "aſſembly, conventicle or meeting, under colour or "pretence of any exerciſe of religion, *&c.*" it ſhall be lawful for any juſtice of the peace to make a record of the offence, and to impoſe the penalty therein mentioned. Theſe perſons were not *ſubjects of this*

realm; and therefore are not within the act of parliament.

As to the second objection. This is a place of worſhip for *Foreigners* in a foreign language. The Defendants claim a right in it, which they complain has been invaded, and they come to proſecute their claim. They do not therefore come in the language of the act, *maliciouſly or contemptuouſly*. The perſons whom the ſtatute meant to puniſh, were thoſe, who violently oppoſe a form of worſhip not ſuitable to their own ideas.

Lord KENYON. As to the firſt objection generally ſaid, he would ſave the point for the opinion of the Court if the Defendants wiſhed he ſhould do ſo, but that he had no doubt in his own mind, and was clearly of opinion that this was a meeting-houſe within the act of parliament. The facts ſtated by way of defence could be no anſwer to this proſecution. Whether the proſecutor and his party were right or wrong could not be conſidered on this trial. The conduct of the Defendants was highly indecorous and improper. If they had a legal right they might obtain redreſs in a court of juſtice. Inſtances might be put where it would be conſidered extremely indecent for a man to exert ſuch a right. In the Church of *England* a parſon might be inſtituted and inducted to a living, but for want of a proper preſentation he might not have a legal title. Should it be ſaid that another clergyman having a better title, might enter into a place which mankind hold ſacred and *manu forti* pull him from the pulpit? No. If he has the right his patron may bring a *quare impedit* or *quare incumbravit*, which-ever

which-ever is ſuitable to his caſe. So here the Defendants might have applied to this court for a *mandamus*, ro to the Court of Chancery as the caſe might require.

The Defendants' counſel alſo objected that by the 18th *ſec.* of the act the indictment ſhould have been *tried* at the ſeſſions. In the preſent caſe the indictment had been there found, but removed by the proſecutor: it was agreed that this point ſhould alſo be ſaved for the opinion of the Court; ſubject to which the Defendants were convicted.

Note. On this laſt queſtion, the Court in *Hilary* Term, 34 *Geo.* 3. gave judgment for the proſecutor. See 5 *Term Rep.* 542.

FISH *v.* SCOTT.

THE Defendant had indicted the Plaintiff for an aſſault, on which indictment the Plaintiff had been found not guilty, and this action was brought for a malicious proſecution of the indictment.

If *A.* ſtrike *B.* and *B.* return the blow, on which *A.* indicts *B.* for an aſſault, the bare fact of *A.* having ſtruck the firſt blow is not ſufficient to ſupport an action for a malicious proſecution.

Erſkine, for the Plaintiff, ſtated that the Defendant firſt aſſaulted the Plaintiff, and the Plaintiff having returned the blow, the parties by agreement went to to an adjoining field, where they ſettled their quarrel by a regular boxing match. Notwithſtanding this the Defendant indicted the Plaintiff.

Upon which opening Lord *Kenyon* ſtopped the cauſe, ſaying it was not enough to ſupport this action, that the party indicted was juſtified in returning the blow that he had received, or that the other had

been guilty of the firſt aſſault. There muſt be ſomething more. Though the Plaintiff was juſtified in defending himſelf from the Defendant's aſſault, yet it was ſtill an aſſault, and there was probable cauſe for the proſecution. Beſides, both parties here joined in a deliberate breach of the peace by retiring into the field and fighting.

The Plaintiff was nonſuited without examining a witneſs.

Saturday, July 7th.

LAWRANCE and Others *v.* DIXON.

The Fleet books are admiſſible evidence on a queſtion of pedigree.

THIS iſſue was directed by the Court of Chancery, to try whether the Plaintiffs were nephews and nieces of *Elizabeth Hall*, deceaſed.

The only diſputed fact in the cauſe was the family of *Elizabeth Hall*. On the part of the Plaintiffs, it was contended that her maiden name was *Lawrance*, and that ſhe was ſiſter to the father of the Plaintiffs. The Defendants on the other hand contended that ſhe was deſcended from a family of the name of *Wright*.

Amongſt other evidence the Plaintiffs produced (by a witneſs who ſaid he had purchaſed them) the *Fleet* books, wherein the marriage of *Daniel Hall* and *Elizabeth Lawrance* was entered to have been celebrated on the 7th of *May*, 1737.

Lord KENYON ſaid, he received this evidence with great doubt. There was a tradition in *Weſtminſter-hall*, that when the books of the *Fleet* were produced before

before Lord *Hardwicke*, he would not receive them in evidence, but cut them to pieces in court. After ſo great an authority had declared againſt them his Lordſhip ſaid, he could not receive them without ſome heſitation, but that he was inclined to think that, in a pedigree cauſe, they were admiſſible, though by no means ſuch evidence as ought to be favourably received (*a*).

After much evidence had been given, it plainly appeared that *Elizabeth Hall* was ſiſter to the Plaintiff's father, that in the early part of her life ſhe went to live with a gentleman of the name of *Wright*, aſſumed his name, and paſſed in the world and amongſt his relations as his niece; in conſequence of which, ſhe after his death received a diſtributive ſhare of his perſonal eſtate. At her death ſhe diſpoſed of her fortune by will, giving 1000*l.* to the Plaintiffs, and after giving other legacies, appointed the Defendant her executor. The Plaintiffs had filed a bill in the Court of Chancery for the ſurplus of the perſonal eſtate, as being her next of kin, and in conſequence of the doubts occaſioned by her having paſſed as the niece of *Wright*, the preſent iſſue was directed.

The Jury found for the Plaintiff.

When the cauſe was over, Lord *Kenyon* ſaid he was extremely clear that the Court of Chancery would order the Defendant (who was the next of kin of *Wright* the inteſtate) to retain to the full amount of the money which he had been defrauded of by this impoſture of the teſtatrix.

(*a*) *Vide Reed* v. *Paſſer* and Others, *poſt*.

Tuesday, July 10th.

REX *v.* PEPYS, Esq.

It is no objection to the competency of a witness on an indictment for perjury committed in an answer in Chancery, that in his answer to a cross bill filed by the Defendant he has sworn the fact which he is to prove on the indictment.

If in answer to a bill filed by *A.* for redemption of lands assigned to him by *B.* the Defendant swear *that he had no notice of the assignment*, and therefore insists on tacking another bond debt due from *B.* to his mortgage, this is a material fact on which perjury may be assigned.

THIS was an indictment for perjury, said to have been committed in an answer to an amended bill in the Court of Chancery. The bill was filed by one *Knight* and *Elizabeth* his wife against the Defendant, for the purpose of redeeming some mortgaged premisses, the equity of redemption whereof had been assigned by *John Hill* to *Francis Hopping*, late husband to the Plaintiff *Elizabeth Knight*, and by him devised to her.

The bill stated the mortgage of the premisses in question to one *Thomas Triquet* for 600 *l.* and a subsequent mortgage of other premisses for 500 *l.* and 200 *l.* for all which sums *Hill* gave his bond, that *Hill* assigned to *Hopping* as above-mentioned, and that *Triquet* by his will bequeathed the mortgaged premisses to the Defendant, and his wife who was *Triquet*'s daughter.

The answer stated that the assignment from *Hill* to *Hopping* was made without the privity or consent of the Defendant, and that he knew nothing of that transaction. Upon this answer the bill was dismissed, and on it the present prosecution was founded.

The Defendant had also filed a bill against *Knight* and his wife to foreclose the equity of redemption, in the answer to which the wife had sworn that the Defendant did consent to, and was acquainted with the assignment of the equity of redemption to *Hopping*.

Elizabeth Knight was called as a witness for the prosecution.

Erskine

Erſkine objected to her on account of intereſt. If it was a material fact in the Court of Chancery whether the Defendant was privy to the aſſignment or not, ſhe ought not to be permitted to give evidence in this cauſe, for ſhe having ſworn directly contrary in her anſwer, will be intitled to diſmiſs the Defendant's croſs bill if ſhe ſucceeds in this cauſe, and convicts him of the perjury imputed to him; ſo that in this reſpect ſhe has a direct intereſt in the event of the cauſe. But he contended that this fact on which the perjury was aſſigned was not a material fact, and ſaid he was informed the Chancellor had ſo decided when he diſmiſſed the proſecutor's bill, for whether the Defendant conſented to the aſſignment or not, he had ſtill a right to retain the premiſſes till *all* the money due on the bond, as well that for which *theſe premiſſes* were mortgaged, as that for which the other mortgage was made, was paid. The Defendant could not be deprived of this right unleſs he formally renounced it by deed.

Lord KENYON. I think there can be no objection to this woman's teſtimony: her own anſwer will be no evidence for her in the Court of Chancery, other evidence muſt be adduced before ſhe can prove her caſe there, ſo that ſhe has no immediate intereſt. The fact on which the perjury is aſſigned is a material fact; mere knowledge has often been held ſufficient to bind in equity, and the conſent need not be by deed. There is one caſe (*a*) in the books which was thought peculiarly

(*a*) See 1 *Vez.* 96. alſo *Mo-ſatta & al'* v. *Murgatroyd*, 1 *W.* 393. But in the caſe of *P. Becket* v. *Cordley*, (*Bro. Cha. Rep.*)

peculiarly hard at the time, where a ſon was held to be affected with notice, by only atteſting the execution of ſome deeds by his father. Which-ever way it is taken, I think this woman is a good witneſs.

She was examined, but the Defendant was acquitted without calling a witneſs, the proſecution appearing in a very odious light to both Court and Jury.

Rep.) 353. Ld. *Thurlow* thought the caſe of *Maccatta* and *Murgatroyd* went too far in imputing notice to the firſt mortgagee upon the mere circumſtance of his being a witneſs to the ſecond mortgage, ſince it is in common practice for perſons to atteſt the execution of deeds without being made acquainted with their contents.

LAROCHE, Bart. and Others *v.* WAKEMAN, Eſq. and Another.

If an uncertificated bankrupt carry on trade and ſell a veſſel to *A.* he has a good title againſt all perſons but the aſſignees.

TROVER for a veſſel or trow, called the *Experiment*, and her tackle *&c.* which the Defendant *Wakeman* as Sheriff, and the other Defendant as Plaintiff, in an action againſt one *Smith*, had ſeized under a *fieri facias* in that action.

Before the ſeizure *Smith* had, by bill of ſale, aſſigned the veſſel in queſtion to the Plaintiffs in truſt for one *Walker*, who had paid a valuable conſideration for it. At the time of this aſſignment *Smith* was an uncertificated bankrupt, but had the poſſeſſion of the veſſel, and carried on trade on his own account, and without any moleſtation by his aſſignees.

Mingay,

Mingay, for the Defendant, objected that this veſſel was the property of the aſſignees, and therefore that *Smith* could give the Plaintiffs no title.

Lord KENYON. If the aſſignees of *Smith* take any ſteps to diſaffirm his title, they may do ſo (*a*), but if they do not, he being the oſtenſible owner may convey a title to the Plaintiffs, ſubject to be diſaffirmed by them, but it is not competent to third perſons to make this objection. I think I remember a caſe of this kind.

The bill of ſale of veſſels for inland navigation need not be regiſtered.

It appeared that the veſſel was at the time of the ſale lying in the *Thames* at *Abingdon*, that ſhe was decked, and went from *London* to *Droitwich &c.* but it did not appear that ſhe had ever been at ſea, though ſhe was frequently in the *Severn* where ſalt water came.

Upon this, *Mingay* objected that the bill of ſale ſhould have been regiſtered purſuant to Lord *Hawkeſbury*'s act (*b*).

Lord KENYON. Theſe are veſſels for inland navigation only, and are not within the intent and meaning of my Lord *Hawkeſbury*'s act, which was made for a very different purpoſe.

Both theſe objections being over-ruled, the parties agreed to refer the quantum of damages to Mr. *Lowten*.

(*a*) *Evans & al'* v. *Mann*, *Cowp.* 570. *Vide Chippendale* v. *Tomlinſon*, 1 *Co. Bank. Law.* 518.

(*b*) 26 *Geo.* 3. *c.* 60. *Vide Rolleſtone* and Others v. *Hibbert* and Others, 3 *Term Rep.* 406.

Friday, July 13th. *At Guildhall.*

BALCETTI *v.* SERANI and Another.

In an action againſt the acceptor of a bill of exchange who defends himſelf on the ground of his acceptance being forged by *A.* evidence that *A.* forged his acceptance to another bill and abſconded on that account is not admiſſible.

IN this action, which was brought by the Plaintiff as indorſee againſt the Defendants as acceptors of a bill of exchange, the Defendants attempted to prove that the acceptance was a forgery of *Latilla* the drawer, who had been clerk to the Defendants.

Several witneſſes were called, who ſwore that they did not believe the acceptance to be the hand-writing of either of the Defendants, and pointed out the difference between this and other acceptances of the Defendants. To corroborate this teſtimony, the Defendants' counſel called a witneſs to prove that *Latilla* had forged the Defendants' name to another acceptance, and had abſconded to avoid the conſequence of a proſecution for that offence.

The Plaintiff's counſel objected to this evidence being received.

Erſkine and *Garrow*, for the Defendants, contended it was admiſſible. Though not of itſelf evidence, yet coupled with the evidence before given, it tended to ſhew that the probability of truth was in favour of thoſe witneſſes who had ſworn they did not believe the acceptance to be the Defendant's hand-writing, and much fortified their teſtimony. *Garrow* mentioned the caſe of one *Lambe*, who was tried in *Surrey* for forgery. The offence charged upon him was forging a bank note. The note in queſtion was found to have been traced with a camel-hair pencil, and amongſt other evidence, to fix the offence upon the

the Defendant, drawings by him in *Indian* ink of the *Britannia &c.* of a bank note were produced. This they contended was ſimilar to the preſent caſe.

BULLER J. (who to-day ſat for Lord *Kenyon*) ſaid he thought the caſe cited was not in point; there the charge was againſt the perſon in whoſe cuſtody the papers were found, and they were connected with the particular fact with which the priſoner was charged. But in this caſe the Plaintiff is an innocent indorſee, and the evidence offered only goes to affect the general character of *Latilla*, but does not touch this particular bill.

The Plaintiff recovered a verdict.

CORDRON *v.* Lord MASSERENE.

A ſheriff's officer who diſcharges a Defendant on payment of the ſum ſworn to, and is afterwards obliged to pay the reſidue of the debt, may recover it from the Defendant as money paid to his uſe.

ASSUMPSIT for money paid, laid out and expended. The Plaintiff being a ſheriff's officer had arreſted the Defendant on a writ againſt him. The writ was indorſed for bail for 306 *l.* 11 *s.* (the ſum for which the bond was given), and on the Defendant paying the Plaintiff this money and the coſts, he diſcharged him. The ſheriff was afterwards called upon to return the writ, and the Plaintiff in the original action inſiſting on being paid his intereſt, the preſent Plaintiff paid that money to prevent an attachment being ſued out againſt the ſheriff. The preſent action was brought to recover this money.

The Defendant's counſel contended that this action could not be maintained. 1ſt. They ſaid that this payment

payment was merely voluntary. The Plaintiff had not been compelled to pay it, nor could he, for he was not liable to more than the ſum ſworn to. 2dly. That this was within the rule laid down in *Eyles* and *Faikney* (*a*), for the Plaintiff had no authority to diſcharge the Defendant without the conſent of the Plaintiff in the former action, or his attorney.

BULLER

(*a*) EYLES *v.* FAIKNEY, *K. B. Eaſter* Term, 32 *Geo.* 3.

The Defendant being a priſoner in the cuſtody of the Plaintiff (who was warden of the Fleet priſon) on meſne proceſs at the ſuit of one *Holland*, a written authority came from *Holland* to the Plaintiff to diſcharge the Defendant out of his cuſtody, but *Molloy*, the Plaintiff's deputy, having doubts as to the authenticity of the diſcharge, applied to *Holland* to know whether it was his hand-writing. *Holland* confeſſed that he had ſigned the paper, but ſaid that he had been impoſed on by the Defendant, and therefore countermanded the authority. The Defendant inſiſted that the authority to diſcharge him was irrevocable, and threatened *Molloy* with an action if he detained him; and *Molloy* thinking that *Holland* could not revoke his order, diſcharged the Defendant out of his cuſtody. *Holland* afterwards brought an action in the Common Pleas againſt the Plaintiff for an eſcape, and recovered a verdict and 300 *l.* damages, to recover which money the preſent action was brought as for money paid, laid out and expended to the uſe of the Defendant.

The cauſe was tried before Lord *Kenyon*, at *Weſtminſter*, and his Lordſhip being of opinion that the Plaintiff had been guilty of a breach of his duty in permitting this Defendant to eſcape, and therefore ought not to be permitted to come as a Plaintiff into a court of juſtice, ordered him to be called.

On a former day *Holroyd* had moved for a new trial, and obtained a rule to ſhew cauſe, which rule coming on, *Law* and *Holroyd* contended that this was not a *voluntary* but a *negligent* eſcape. They cited *Moore*, 597, to ſhew the difference between a

voluntary

BULLER J. This is not a voluntary payment, the Plaintiff would have been obliged to pay the whole ſum due, by law, for though bail above cannot be charged

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voluntary and a *negligent* eſcape, and contended that though the Plaintiff's ignorance of the law was no anſwer to *Holland*'s action, yet it ſhewed that he did not ſuffer the Defendant to eſcape from a corrupt motive, and therefore he ought to recover in the preſent action. In the caſe of The *Sheriffs of Norwich* v. *Bradſhaw*, *Cro. Eliz.* 53. and *Godb.* 125. the Court held that a ſheriff from whom a priſoner had eſcaped, might maintain an action immediately after the eſcape, though no action had been brought againſt him. Tho' *Holland* had not, yet he probably might have recovered the whole of his debt againſt the preſent Plaintiff. This would have been a diſcharge of the Defendant for the whole debt, and the preſent verdict is a diſcharge *pro tanto*. In a caſe which aroſe ſome years ſince, the Court held that the recovery of a penalty againſt a ſervant, was a bar to any action againſt the perſon who ſeduced him from his maſter's ſervice. See *Bird* v. *Randall*, 3 *Burr.* 1345. So it has been held that if an action is brought to recover treble damages for not ſetting out tithes, the Plaintiff cannot afterwards bring an action to recover the tithes, Sir *Richard Champernon* v. *Hill*, *Yelv.* 63. Had the Plaintiff voluntarily permitted the Defendant to eſcape, on a promiſe to pay him a ſum of money, or to indemnify him, it would have been a very different caſe, for the Plaintiff would have been guilty of a groſs violation of his duty. But even ſuppoſing this to have been what the law calls a voluntary eſcape, ſtill they contended that the Plaintiff might recover this money. In a caſe of *Morris* and *Bulkley*, tried before Mr. J. *Yates* at *Worceſter Lent aſſizes*, 1765, that Judge held that if a ſheriff *voluntarily* permitted a priſoner to eſcape, he might recover the money which he was obliged to pay, in an action againſt the priſoner for money paid to his uſe, and Mr. J. *Gould* was of the ſame opinion.

Erſkine, for the Defendant, ſhewed cauſe againſt the rule. He obſerved that to make an

charged with more than the ſum ſworn to, yet it is not ſo with the ſheriff or the Defendant, againſt whom the Plaintiff may recover the whole of his debt. To bring this within the caſe of *Eyles* and *Faikney*, the Defendant ſhould ſhew ſome improper conduct in the Plaintiff, and then I admit the rule that a Plaintiff muſt draw his juſtice from pure fountains would apply: but if I were to determine that the Plaintiff had done wrong in this caſe, I muſt ſay that a ſheriff's officer could not in any caſe receive the debt and coſts and diſcharge the Defendant, which might be attended with very miſchievous conſequences to Defendants.

Verdict for the Plaintiff.

eſcape voluntary it was not neceſſary that the gaoler ſhould have a corrupt intention, if it was by his conſent, it was ſufficient. No eſcape could be called merely negligent, unleſs effected by the pure act of the priſoner, without the conſent, and againſt the knowledge of the gaoler, *ex dolo malo non oritur actio.* He was proceeding, when he was ſtopped *by the Court*, who, ſaid "the rule "muſt be diſcharged."

Saturday, July 14th. At Guildhall.

GRELLIER *v.* NEALE and Others.

If the Defendant's hand-writing to a Deed is proved, the Jury may preſume the ſealing and delivery.

ASSUMPSIT for goods ſold and delivered. The goods were ſold to *William Neale* the firſt Defendant, and *Redhead*, in whoſe names the buſineſs was carried on, but the Plaintiff diſcovering that the other Defendants were dormant partners, brought this action againſt all.

To

To prove a partnerſhip deed, the Plaintiff's counſel called the ſubſcribing witneſs, who ſaid ſhe did not ſee the deed executed, but that *William Neale* brought it to her, and deſired her to put her name thereto as a ſubſcribing witneſs, which ſhe did, none of the other Defendants being preſent. The Plaintiff's counſel then offered to call witneſſes to prove the hand-writing of the other Defendants, which the Defendant's counſel objected to; contending that as it was a deed under ſeal, bare proof of the hand-writing was not ſufficient, but a ſealing and delivery muſt be proved.

Lord KENYON. The ſubſcribing witneſs not having ſeen the deed executed, it is the ſame as if there was no witneſs at all; and in that caſe the hand-writing may be proved by another witneſs. As to the objection that the ſealing and delivery ought to be proved, I am clearly of opinion, that if the ſignature is proved to be the Defendant's hand-writing, we ought to preſume that it was ſealed and delivered. (*a*).

The Plaintiff then proved the hand-writing and obtained a verdict.

Mr. *Beareroft*, one of the Plaintiff's counſel, ſaid it was a point which had been frequently ruled.

(*a*) *Vide Dougl.* 206. *Fuſſet and Another* v. *Brown*, *ante* 23. acc. *Buil. N. P.* 254. *contra.*

Monday, July 16th.

SMITH *v.* The Company of ARMOURERS and BRAZIERS of the City of London.

A man who has been engaged as a chief clerk and manager to a manufacturer for ſeven years, has ſerved a ſufficient apprenticeſhip within the 5 *Eliz.* though he was never engaged in the manual labour of the buſineſs.

A *Mandamus* had iſſued to the Defendants, commanding them to admit *Edward Smith* the Plaintiff, a freeman of the company of Armourers and Braziers.

To this *mandamus* the Deſendants returned, that the ſaid *Edward Smith* was not duly qualified to be admitted a freeman, not having ſerved an apprenticeſhip according to the ſtat. of *Elizabeth.* The Plaintiff pleaded to this return and joined iſſue thereon.

It appeared, that the Plaintiff had never been bound apprentice, nor even worked at the trade. He in the year 1775, went to live with Meſſrs. *Thoytes & Co.* who were very large founders in the city, as clerk and packing porter, he continued with them for 15 years during the greateſt part of which time he conducted the whole of their extenſive works, received all the orders, gave directions to the workmen, *&c.* but never was engaged in the manual labour of the buſineſs. All the witneſſes ſaid he knew how to *conduct the buſineſs* as well as any maſter in *London,* but that he did not know how to manufacture the commodity by his *own perſonal labour.* During ſome part of the time he was with Meſſrs. *Thoytes & Co.* he was under articles of agreement, but ſuch articles were never for a longer term than 2 years, at the end of which time they were renewed.

It was objected by the Defendants' counſel, that this was not a ſufficient apprenticeſhip to entitle the Plaintiff,

tiff, by the general law of the land, or the cuſtoms of the city, even to exerciſe his trade; and therefore that he could not be admitted of the company.

Lord KENYON. I am of opinion, that there has been a ſufficient apprenticeſhip within the ſtat. of the 5th of *Eliz.* to entitle this perſon to exerciſe his trade. When that act was made, thoſe who framed it might find it beneficial, but the ink with which it was written was ſcarce dry, ere the inconvenience of it was perceived; and Judges falling in with the ſentiments of policy entertained by others, have lent their aſſiſtance to repeal this law as much as it was in their power. Very ſoon after this ſtatute was made, the Duke of *Alva*'s perſecutions in the *Netherlands*, under that monſter *Philip* the Second, brought over an immenſe ſource of induſtry to this country; all the manufacturers being driven from their own. Then the inexpedience of this ſtatute was ſufficiently felt, and ſo ſtrictly has it been conſtrued, that it has even been determined that a man carrying on *one* buſineſs for ſeven years without any effective proſecution, has ſerved a ſufficient apprenticeſhip to enable him to carry on, not only that one trade (*a*) but *any* other. There is no particular cuſtom ſtated in this caſe, ſo that it muſt entirely reſt on the ſtatute; and I am clearly of opinion he is not within it. The reaſon for making it was, that bad commodities might not be ſpread abroad; but natural reaſon tells us, that if the manufacture is not good, there is no danger of its having a favourable reception in the world, or anſwering the tradeſman's purpoſe.

Verdict for the Plaintiff.

(*a*) *Vide Walter qui tam* v. *Holton*, 1 *Black.* 233. *French qui tam* v. *Adams*, 2 *Wilſ.* 168.

Lord KENYON ſaid, he thought this a ſufficient intereſt to ſupport the action. The Plaintiff could not aſſent to the legacy before the teſtator's debts were paid, without being guilty of a *devaſtavit*, and being executor, all the intereſt of the teſtator veſts in him.

The cauſe proceeded, but it appearing that *Holden* was in a dying ſtate when the policy was effected, the Defendant had a verdict.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM

33 GEORGE III. 1792.

WELLER *v.* The GOVERNORS of the Foundling Hoſpital.

Monday, December 3d. *At Weſtminſter.*

ASSUMPSIT for work and labour. The Plaintiff had been employed to dig a well and to put down a pump at the Hoſpital. When the pump had been put down, the water was very bad, and the only queſtion in the cauſe was, whether the water was ſpoiled and made fetid by the wooden pump, or whether it was bad from any other cauſe. If the former ſhould be found to be the caſe, the Plaintiff had agreed to take back the pump.

Mere truſtees of a public charity are good witneſſes in an action brought againſt *themſelves* in their corporate capacity.

Moſt of the witneſſes called on behalf of the Defendants were Governors.

Mingay, for the Plaintiff, objected to their competency, not on the ground of intereſt, but becauſe they were Defendants on the record.

Lord KENYON was of opinion, that they were nevertheleſs good witneſſes. His Lordſhip ſaid they were ſued in their corporate, and not in their natural and individual capacities. That this caſe was different from the caſe of a Mayor and Citizens, becauſe though ſued in their corporate name, they might ſtill have a great intereſt in the event of the cauſe; for inſtance, a citizen of *London*, had great and important rights to ſupport; but theſe Defendants had not the leaſt perſonal intereſt; they were mere truſtees of a public charity.

The Defendants' caſe was clearly proved, and Lord *Kenyon* being of opinion, that the Plaintiff was intitled to be paid for digging the well, though not for the pump; it was agreed to refer the queſtion, whether a ſufficient ſum of money had been paid the Plaintiff, to arbitration.

Tueſday, Dec. 4th.

GRAHAM and Others *v.* HOPE and Others.

When partners diſſolve their partnerſhip, they ſhould ſend notice to all perſons who have truſted them as partners, a notice in the *Gazette* is not ſufficient.

THE Defendants had been in partnerſhip together, and the Plaintiff had ſold them goods as partners. Afterwards the partnerſhip was diſſolved, and notice of the diſſolution given in the *London Gazette*; and after this notice, the Plaintiff had ſold and delivered the goods for which the preſent action was brought.

The Defendants called witneſſes, who ſwore that a notice had been given to the agent of the Plaintiff, that the partnerſhip was diſſolved. The agent on the

the contrary poſitively ſwore that he had received no ſuch notice.

Lord KENYON told the jury, that the cauſe depended entirely on the credit they gave to the witneſſes on the one ſide and the other. The *Gazette*, he thought, was not *of itſelf* ſufficient notice to the Plaintiff of the diſſolution of the partnerſhip. His Lordſhip ſaid he did not ſay this for the purpoſe of this cauſe merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never ſaw a *Gazette* to the day of their deaths, and very miſchievous would be the conſequences if they were bound by a notice inſerted in it. It was incumbent on perſons diſſolving a partnerſhip, to ſend notice of ſuch diſſolution to all the perſons with whom they had had dealings in partnerſhip.

The jury, believing the Defendants' witneſſes, gave a verdict for the Defendants. (*a*)

(*a*) *Vide Gorham and Another* v. *Thompſon and Another*, *ante* 42,

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REX *v.* M'CARTHER.

Friday, Dec. 7th.

THIS was an indictment for perjury committed on the trial of an information in the Exchequer, againſt one *Gibb* for concealing ſoap.

If a witneſs who is a *Scotch* covenantor be ſworn on the teſtament, and afterwards *at the deſire of the counſel*, according to the ceremonies of his own country, he may be indicted as having ſworn on the teſtament.

The indictment ſtated, that the Defendant was ſworn upon the holy goſpels of God. It was proved, that the Defendant was firſt ſworn on the Teſtament, in the uſual form, but the *Solicitor General* underſtanding

ſtanding that the Defendant was a member of the kirk of *Scotland*, deſired he might be ſworn by holding up his hand (*a*), and the oath was ſo adminiſtered.

Garrow, (who at the deſire of Lord *Kenyon* took the defence on himſelf, the Defendant not having any counſel) objected, that this was a fatal variance. The indictment ſhould have ſtated, that he was ſworn by holding up his hand, for though he was firſt ſworn in the uſual way, it was not under the ſanction of that oath he gave his evidence, and therefore he could not be indicted for perjury on that oath.

Lord KENYON obſerved, that the indictment would have been ſufficiently certain, if it had only ſtated the Defendant to have been in due manner ſworn. If the Defendant had only been ſworn according to the form of *Scotland*, this would have been a good objection; but as in the preſent caſe the Defendant had ſuffered himſelf to be ſworn in the uſual way without objection on his part, he would not ſuffer him by acting the hypocrite, to eſcape puniſhment.

The Defendant was convicted.

(*a*) *Vide Mee* v. *Reid*, *ante* 23.

Monday, Dec. 10th. *At Weſtminſter.*

BERRY and Another *v.* BANNER and Another.

On an iſſue whether a church-warden ought to be elected by the ſelect veſtry, a record between a former churchwarden and another perſon is admiſſible evidence.

THE Plaintiffs declared in prohibition, and by their declaration alledged, that "there was, "and from time whereof the memory of man, *&c.*

"had

" had been within the pariſh of *St. Martin in the* " *Fields* in the county of *Middleſex*, a veſtry of the ſaid " pariſh, compoſed of a *certain* number of *ſelect* per- " ſons pariſhioners and inhabitants of the ſaid pariſh " for the time being, called a *Select Veſtry*; which " ſaid *ſelect veſtry* for the time being, during all the " ſaid time immemorial, on *Eaſter Monday* in every " year, had been accuſtomed to nominate and elect, " and of ancient right and cuſtom ought to nominate " and elect, two pariſhioners and inhabitants of the " ſaid pariſh, to be and ſerve the office of church- " wardens of the ſaid pariſh of *St. Martin in the Fields*, " for one year then next enſuing; which ſaid perſons, " being pariſhioners and inhabitants of the ſaid pariſh, " ſo nominated, elected and choſen by the ſaid *ſelect* " *veſtry*, and none others, had, for and during all the " time aforeſaid, been duly ſworn into, and ſerved " and executed, and by right of cuſtom ought to have " ſerved the office of church-wardens of the ſaid pa- " riſh." The declaration further ſtated, that the Plaintiffs were duly elected church-wardens by the ſelect veſtry, ſworn into that office, and were entitled to ſit in a pew in the pariſh church appropriated for the uſe of the church-wardens; nevertheleſs, that the Defendants had wrongfully drawn the Plaintiffs into a plea in the Spiritual Court; claiming a right to the ſaid pew as church-wardens of the ſaid pariſh.

If in pleading, it is ſtated, " that " from time im- "memorial there " had been a ſe- " lect veſtry " compoſed of a " *certain* number " of ſelect per- " ſons," it is incumbent on the party making that averment to prove that the veſtry has conſiſted of a *definite* number.

So if it had been ſtated that the veſtry was compoſed of a *certain* ſelect number of perſons *comme ſemble*. A ſelect veſtry cannot be conſtituted by a faculty from the Biſhop.

The Defendants pleaded the general iſſue; and for a writ of *conſultation* ſaid, that the right of election was in the pariſhioners at large, and that they were elected by them, and duly ſworn into their office, and traverſed the cuſtom ſet out in the declaration.

The

The Plaintiffs, as a part of their evidence, offered the copy of a judgment in this court, in *Trin.* term 14 & 15 *G.* 2. between *Wm. Kendal* and Sir *Henry Penrice*, the official to the then Archdeacon of *Middlesex*. That was an action for a falſe return. The Plaintiff *Kendal* and one *Tucker*, had been elected by the pariſhioners at large; and the ſelect veſtry had choſen the ſaid *Tucker* and *Wood*. But the right of election then being diſputed, Sir *Henry Penrice* refuſed to ſwear in either ſet of church-wardens, and left them to apply to this court for a *mandamus*, which they accordingly did, and both obtained writs. The official ſwore in *Tucker* and *Wood*, and to the *mandamus* to ſwear in *Tucker* and *Kendal*, returned that he had already ſworn in *Tucker* and *Wood* as the church-wardens elected by the veſtry. Upon which *Kendal* brought the action, and upon the trial, a verdict was found for the Defendant.

Erſkine for the Defendants, objected that this being *res inter alios acta*, could not be evidence in this cauſe.

Lord KENYON. I am clearly of opinion it is evidence. I will not ſay whether it is *concluſive* or not. In queſtions of cuſtom, ſuch evidence is always admitted. If a right of common is claimed under a cuſtom, and one perſon brings an action, the record in that cauſe is evidence between other parties (*a*). If any fraud can be ſhewn that will deſtroy the effect of it; but if unimpeached, it is evidence very near concluſive, if not quite ſo.

(*a*) *Carth.* 181. *Bull. N. P.* 233.

The

The Plaintiffs alſo proved a copy of a judgment in *Hilary* term 1744, on a feigned iſſue, between *Ferrers* and *Nind*, " whether there then was, and from time, " *&c.* had been a veſtry of the ſaid pariſh, compoſed " of a *certain* ſelect number of perſons pariſhioners of " the ſaid pariſh for the time being." Which was found in the affirmative.

Many entries in the pariſh books from the year 1625 to 1700, were read; from all which it appeared that the veſtry was ſelect, but that ſometimes a *larger* and at other times a *ſmaller* number of the inhabitants attended.

Erſkine here objected, that though the Plaintiffs had proved that there was a ſelect veſtry, yet it was not proved that the veſtry was compoſed of any *certain* definite number, but that on the contrary all the evidence ſhewed that the number was indefinite.

Bearcroft for the Plaintiffs, endeavoured to anſwer the objection by ſaying, that the word certain, did not oblige the Plaintiffs to prove a definite number. That the ſum and ſubſtance of the allegation was, that there had been a ſelect veſtry. But that which-ever way it was taken, there was evidence to go to the jury, for that the words of this record, that the veſtry was compoſed of a *certain* number of *ſelect* perſons, were ſynonymous with thoſe uſed in the record between *Ferrers* and *Nind*, that it was compoſed of a *certain ſelect* number of perſons.

Lord KENYON ſaid he thought it was an objection which could not be got over; upon which the Plaintiffs called a witneſs to prove that the ſelect veſtry had for ſome time conſiſted of 49.

The

The Defendants then proved a faculty from the Biſhop of *London*, dated 28th of *June* 1662, whereby he granted and *confirmed* to them that they ſhould be a ſelect veſtry to conſiſt of 49. They alſo examined ſome witneſſes to prove that it was generally underſtood in the pariſh that the number of 49 was only eſtabliſhed by the faculty.

Bearcroft, in his reply to the jury, ſtill contended that no preciſe definite number need be proved to ſuſtain the iſſue. Suppoſe this had been in *Latin*, as legal proceedings formerly were, it would have been *quidam numerus*, this means no more than "a num-"ber", but lawyers when expreſſing that in *Engliſh*, could not ſo well do it, without literally tranſlating it, and ſaying a *certain* number. When we ſpeak of a *certain* man in telling a ſtory, we mean ſome human being, but no one particular perſon. He then contended, that the evidence he had adduced, proved that a veſtry conſiſting of 49 exiſted before the faculty was granted; and that if this was an averment, that the veſtry was compoſed of a *ſettled, definite* number, the record in the former cauſe equally contained ſuch an averment.

Lord KENYON (to the jury). At the time I interpoſed, I had an idea that the Plaintiffs on this iſſue, muſt prove that the veſtry conſiſted of a *certain* number. I ſtill retain that opinion. The queſtion for you to conſider is, whether the Plaintiffs have made out a *certain* number. There are ſome things reſpecting the good government of the church, which belong wholly to the ordinary; the diſpoſal of ſeats, where there is no preſcriptive right, the ordering of devotion,

devotion, &c. But by the common law, all the pariſhioners who pay ſcot and lot have a right to be of the veſtry. By immemorial cuſtom this right may be reſtrained to a ſelect number, and it is highly convenient in populous pariſhes that it ſhould be ſo; but ſtill it cannot be done but by immemorial cuſtom. The faculty *proprio vigore*, is a dead letter, though it may be evidence of the antecedent right. Mr. *Bearcroft* very properly got up and ſaid he would give proof of a *certain* number, and admitted that the faculty was not ſufficient of itſelf. The word *grant* in the faculty ſeems to introduce ſomething new, but the word *confirm* ſuppoſes an antecedent cuſtom. I have no doubt but there is a ſelect veſtry; the only queſtion is whether there is any ſlip in the proceedings. I am not ſure that there is any difference in the words of theſe two records; I rather think the former verdict is evidence of a *certain* ſelect number. In 1625, perſons were elected in the place of perſons dead, it therefore ſhews a *certain* number, or why ſay, in the *place* of others. If you think the *faculty* only, fixed a *certain* number, you muſt find for the Defendants: If the verdict in 1744, and the other evidence prove a *determinate* number from time immemorial, the Plaintiffs are intitled to your verdict. It is for you to decide.

The Jury found a verdict for the Plaintiffs (*a*).

(*a*) *Vide* 4 *Burn's Eccl. L.* 8, 9.

Wednesday, December 12th, *At Guildhall.*

AITCHESON and Another v. MADOCK, Gent. One, &c. and Another.

Hair powder made of ſtarch ground fin, ſtill remains ſtarch; and packages of more than 28lb. weigh. removed from one place to another muſt be marked as *ſtarch*.

THIS action of *aſſumpſit* was brought againſt the Defendants for negligence as attornies in commencing an action againſt exciſe officers, for ſeizing a quantity of hair powder, belonging to the Plaintiffs, without giving the previous notice required by law.

The declaration ſtated, that before the making of the promiſe, a large quantity, to wit, *&c.* of hair powder belonging to the Plaintiffs had been *unlawfully* ſeized by the officers; and in conſideration that the Plaintiffs would retain and employ the Defendants as their attornies, to bring an action againſt the perſons who had made the ſeizure, they promiſed to conduct themſelves properly, *&c.*

The Plaintiffs proved that the ſtarch in queſtion, which had been brought in hogſheads from *Scotland* to *England*, was in fact ſeized.

The Defendants' counſel objected, that it was not proved the ſeizure was unlawful. In anſwer to which Lord *Kenyon* ſaid, he would preſume the ſeizure unlawful until the contrary was proved.

The Defendants then proved that the powder was in fact nothing more than ſtarch ground fine, without any other ingredient. By the act of the 24 *Geo.* 3. *c.* 48. *ſ.* 4. it is enacted, that "when any "ſtarch exceeding the quantity of 28lb. weight, ſhall "be removed or carried by land or water, the word "*ſtarch* ſhall be painted or marked in legible letters "of at leaſt three inches in length on every cheſt, "*caſk*, ſack or package, wherein ſuch ſtarch ſhall be "con-

"tained, and any ſtarch exceeding, *&c.* which ſhall be "found removing, or carrying, or removed or carried "by land, *&c.* in any cheſt, *&c.* not having the word "*ſtarch* ſo painted or marked thereon, ſhall be for-"feited, together with the cheſt, *&c.* containing the "ſame, and the boat or veſſel, horſes or other cattle, "waggon, *&c.* made uſe of in removing or carrying "the ſame;" and this powder not being ſo marked, the Defendants' counſel contended, that it was ſubject to ſeizure, and the averment that it was *unlawfully* ſeized was diſproved.

The Plaintiffs' counſel inſiſted, that though nothing was added to the ſtarch, it had ſtill become another article, and therefore need not be marked.

Lord KENYON ſaid, it ſtill remained ſtarch; and his Lordſhip ſaid he believed there was a caſe ſome years ſince in the *Exchequer* before Lord Chief Baron *Skynner*, where Sago powder was found, on inveſtigation, to be compoſed of ſtarch, and though uſed for another purpoſe, ſtill as it had been ſtarch, in the courſe of the manufacture, it was held liable to the duties on ſtarch. (*a*) The Plaintiffs had therefore failed in proving the taking to be unlawful, and muſt be called.

Accordingly the Plaintiffs were nonſuited.

(*a*) *Rex* v. *Stringer*, *Exch.*

MAUGHAM qui tam *v.* WALKER.

Wedneſday, December 19th. *At Guildhall.*

DEBT on the ſtatute againſt uſury, for taking 50 *l.* for a loan of 1000 *l.* to *Joſeph Ubank* for ſix months.

An account in the hand-writing of the perſon borrowing money, is no evidence for the lender, in an action for uſury brought againſt him by a common informer.

John Ubank, the brother of *Joſeph Ubank*, proved the Plaintiff's caſe. He acted as agent for his brother *Joſeph*, and received the money advanced, for his uſe.

Erſkine, for the Defendant, offered to produce in evidence an account in the hand-writing of *Joſeph Ubank*, wherein he admitted part of this 50 *l.* to be paid, on the balance of an old account.

Lord KENYON. This is *res inter alios acta*. *Joſeph Ubank* is no party to this record; he might be called as a witneſs and prove this account on oath, but I cannot permit any account of his, not on oath, to be read in evidence. His Lordſhip further ſaid, that if the caſe really were as ſtated by the Defendant's counſel (*Joſeph Ubank* being now abroad), the Court ought, in ſo penal a caſe as the preſent, to grant a new trial.

In a penal action the Plaintiff is at liberty to ſhew the action commenced within a year, as well *after* as before the objection, that it does not appear on the record, is made.

The bill was not filed within the year, and the Plaintiff's counſel did not produce the writ as a part of their evidence. *Erſkine* objected that it did not appear that the action was commenced within a year; and on *Bower*, the Plaintiff's counſel then offering to produce the writ, he contended that after the objection was made, it was too late to give this evidence, though that indulgence was allowed in a mere civil action, yet it was not proper or uſual in a penal one.

But Lord KENYON was of opinion that the Plaintiff might prove the commencement of the ſuit at any ſtage of the cauſe; upon which the writ was produced, and it appearing to have been ſued out within a year

a year after the offence committed, the Plaintiff had a verdict for the penalty of 3000*l.* (*a*)

(*a*) This was afterwards compounded. See 5 *T. Rep.* 98.

SHAW and Others *v.* MARKHAM, Clerk.

ASSUMPSIT againſt the Defendant as indorſer of two promiſſory notes, drawn by *Thomas Thomas.*

Parol evidence of a letter containing an account of the diſhonour of a note of hand, is not admiſſible, unleſs notice has been given to produce ſuch letter.

A witneſs of the name of *Oſborne* ſwore that when *Thomas* diſhonoured the note, he wrote three letters to the Defendant to inform him of it, and ſent one to his living at *Cheſter*, another to his living in *Yorkſhire*, and a third to the bookſeller's where he uſually lodged when in *London*. No notice had been given the Defendant to produce theſe letters, nor any copy kept.

Erſkine, for the Defendant, objected to the evidence, contending that no notice having been given to produce theſe letters, the Plaintiff could not give parol evidence of their contents.

Bower, for the Plaintiff, anſwered that the letters themſelves were nothing more than a notice, and that it was an eſtabliſhed rule that no notice need be given to produce a notice.

Lord KENYON ſaid this objection could not be got over, and no evidence of the contents of the letter could be received without a notice to produce it. Call it a notice or by any other name, it was ſtill a letter, and muſt be proved as any other written paper. The

Defendant's counſel then conſented that the cauſe ſhould proceed, with liberty for the Defendant to move to enter a nonſuit in caſe the Plaintiffs ſhould be intitled to a verdict on the merits.

It appeared that *Thomas* having compounded with his creditors, he aſſigned his effects to the Plaintiffs for their benefit; and *it was agreed that* Thomas *ſhould retain the fixtures and ſtock in trade* in conſideration of which he gave theſe notes, and the Defendant indorſed them *as his ſurety*. This was done under the hope and expectation that *Thomas* was to be made a new man by this deed, but ſome of his creditors, to the amount of about 1000 *l.* refuſing to come in under the deed, a commiſſion of bankrupt was ſued out, and the very fixtures and ſtock which *Thomas* was to have, ſeized under that commiſſion.

On this evidence the Plaintiffs were nonſuited.

LEE *v.* HUSON.

Thurſday, December 20th.

In an action for a libel, other papers which are themſelves libels on the Plaintiff may be given in evidence to increaſe the damages.

THIS was an action for a libel. After the libel had been read, the Plaintiff's counſel offered in evidence other letters and papers which alſo amounted to libels.

Shepherd, for the Defendant, objected to this evidence, contending that the Plaintiff could not give in evidence any thing which was itſelf cauſe for a diſtinct action. If the other papers might be given in evidence in this cauſe, the libel for which this action is brought would alſo be evidence in any action which

which might be brought for the other libels, and the Plaintiff would have damages ſeveral times over for the ſame libel.

Lord KENYON ſaid, he thought theſe letters might be received in evidence, though they contained matter which was a ground for another action. His Lordſhip obſerved, that in actions for words it was the practice to admit evidence of other words beſides thoſe charged in the declaration, and therefore he ſhould receive this evidence (*a*).

The papers were therefore read, and the Jury found a verdict for the Plaintiff, and 300 *l.* damages.

(*a*) *Sed vide Mead* v. *Daubigny*, *ante* 125. And *Charlter* v. *Barret*, *ante* 22.

WHITWELL and Others, Aſſignees &c. *v.* DIMSDALE and Others.

DETINUE for the bill of ſale of a ſhip delivered by the bankrupt to the Defendants. Amongſt other pleas, the Defendants pleaded one, putting the bankruptcy in iſſue.

An agreement not ſtamped cannot be received as evidence for any purpoſe whatever, not even to ſhew that the party meant to commit a fraud by that agreement.

The Plaintiffs offered a paper writing, purporting to be an agreement made between the bankrupt and his ſons, by which the former agreed to aſſign his effects to the latter. It was not ſtamped.

Erſkine contended that though not evidence of an agreement, yet this paper might be read to prove that the bankrupt was in a falling ſtate, and had an intention of defrauding his creditors, and ſaid there

had been a caſe in which a man was convicted of forging an inſtrument not ſtamped.

Lord KENYON ſaid he was of opinion that this paper writing could not be given in evidence, *for any purpoſe whatever*, either to eſtabliſh or defeat it; nor did he agree with the caſe cited as to the forgery.

The Plaintiffs produced other evidence, and obtained a verdict.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM,

33 GEORGE III. 1793.

REX *v.* BUTCHER and Others.

Saturday, February 16th. *At Weſtminſter.*

THESE Defendants were indicted for the reſcue of one *Philip Evans* from his bail, when they were going to ſurrender him in their diſcharge.

Bail above put in by the ſheriff (who had diſcharged the Defendant without a bail bond) may ſurrender the Defendant.

A writ on the Lottery act requiring bail for 500 *l.* had iſſued out of the Court of *Common Pleas* againſt *Evans*, and he was arreſted thereon by a ſheriff's officer of the name of *Coulſon*. *Coulſon* diſcharged the Defendant without taking any bail bond; *and after the return of the writ*, fearing that the ſheriff might be called on, prevailed on *Purnel* and *Dennis* to become bail above. They immediately went to take *Evans* into their cuſtody for the purpoſe of ſurrendering him. *Purnel* and *Dennis* had never ſeen *Evans* on the ſubject of their becoming bail, nor did they even know him. *Evans* on being thus ſuddenly ſeized,

ſeized, oppoſed *Purnel* and *Dennis*, and the Defendants aſſiſted him in making his eſcape.

Marryat, for the Defendants, contended that the ſheriff's officer having voluntarily permitted *Evans* to eſcape, could not ſurrender him after the return of the writ, either by taking him himſelf, or in a circuitous way by putting in bail above, and cauſing them to ſurrender him.

Lord KENYON. The bail had a right to ſurrender the Defendant. They were his bail, and whether with or without his conſent was immaterial; they had ſtill the right, and they told him they were come for the purpoſe of ſurrendering him. If he reſiſted them it was at his peril, it would be ſo even in the caſe of death, and had either of the bail been killed, all the Defendants would have been guilty of murder. They ſhould have ſubmitted, and not taken the law into their own hands.

The Defendants were convicted.

REX *v.* DOWLIN.

Tueſday, February 19th. *At Guildhall.*

Though to ſupport an indictment for perjury committed on a former trial the proſecutor muſt in general prove the whole of the Defendant's examination, yet when the perjury was committed in ſwearing to a fact not connected with the general merits of the cauſe, proof of the croſs examination only is ſufficient.

THIS was an indictment for perjury, committed on the trial of *John Kimber*, for the murder of a negro girl on board a ſlave ſhip, of which *Kimber* was commander.

Amongſt other queſtions aſked the Defendant on his croſs examination, one was "whether he had not declared

declared to Mr. *Jacks* that he would be revenged of *Kimber*, and work his ruin." He ſwore he had made no ſuch declaration, and upon that anſwer perjury was aſſigned. There were alſo aſſignments of perjury on the evidence given by the Defendant as to *Kimber*'s treatment of the girl.

The ſhort-hand writer could not prove the whole of the examination in chief, as he had only taken down particular parts of it, but he proved all that was ſworn on the croſs examination.

Lord KENYON ſaid, that to convict a Defendant of perjury, he ſhould always require the whole of his evidence to be proved, for a man might explain by one part of his evidence what he had ſworn in another; and therefore as to the perjury aſſigned on the Defendant's evidence concerning *Kimber*'s behaviour to the girl, he would not proceed on it. But the queſtion as to what had paſſed between the Defendant and *Jacks*, was entirely unconnected with the original examination. That queſtion could ariſe on the croſs examination only, and every thing which the Defendant ſwore on that examination being proved, the proſecutor might proceed to falſify it.

The Defendant was convicted on that aſſignment. (*a*).

(*a*) *Vide Rex* v. *Jones*, *ante* 38.

Friday, February 22d. At Weſtminſter.

HATCHET and Wife *v.* MARSHAL.

If the Plaintiff obtain an order for the particulars of the Defendant's ſet-off, and, upon an application to the Defendant's attorney to deliver a particular under the order, he refers to another already delivered by his client, he is not obliged to deliver a freſh particular.

THIS was an action of covenant for non-payment of rent, *&c.* As to the breach for non-payment of rent, the Defendant pleaded a ſet-off.

The Plaintiffs had taken out a ſummons for the particulars of the Defendant's ſet-off, and obtained a Judge's order thereon. When the Plaintiffs' attorney applied to the Defendant's attorney to comply with the order, he ſaid that the Defendant had delivered the Plaintiffs an account in writing before the commencement of the action, and that he could not give any further particulars than were contained in that account.

The Plaintiffs' counſel objected that the Defendant not having delivered any particular purſuant to the order, could not go into his ſet-off.

Lord KENYON. This is a virtual compliance with the order. If I were to hold that the Defendant was not intitled to go into his ſet-off, I ſhould be ſpreading a net of form to catch the parties. The intent of the order was that the Plaintiff ſhould not be ſurpriſed, and when the Defendant refers to another account, that intent is fully anſwered. I will not permit the Defendant to go out of that account.

The Defendant had alſo pleaded an eviction, but that plea not being proved, nor the ſet-off covering the Plaintiffs' demand, they had a verdict for the balance.

WRIGHT and Others *v.* RILEY.

ASSUMPSIT againſt the Defendant as indorſer of a bill of exchange, dated 9th *September*, 1791.

It is no defence to an action at the ſuit of the indorſee of a promiſſory note or bill of exchange that the bill was not ſtamped at the time of making it, if it has a proper ſtamp when produced at the trial.

The bill when produced in evidence appeared to be properly ſtamped, but the Defendant proved that it was not ſtamped when drawn, nor for ſome time afterwards.

Erſkine, for the Defendant, contended that the bill was abſolutely void, and could not be made good by the ſtamp impreſſed upon it after it was drawn, for by the act of the 31 *Geo.* 3. *c.* 25. *ſ.* 19. it is enacted that the paper on which any bill is written ſhall be ſtamped before the bill is drawn; and that it ſhall not be lawful for the Commiſſioners of the Stamp Duties to ſtamp any paper on which ſuch bill ſhall be written after the ſame is written thereon.

Lord KENYON ſaid, that though the Commiſſioners might have exceeded their duty in ſtamping the bill againſt the poſitive directions of the act of parliament, ſtill that being ſtamped, he thought it was become a valid inſtrument, and a Judge at *Niſi Prius* could not enquire how and at what time it was ſtamped. Much inconvenience might ariſe, and a great check be put upon paper credit, if the objection was to be allowed, for how was it poſſible for a man taking a bill in the ordinary courſe of buſineſs to know whether it had been ſtamped previous to the making of it or not.

The Plaintiffs had a verdict.

Saturday, Feb. 23d.

LLOYD *v.* HARRIS.

In an action for a malicious arreſt, the plaintiff muſt prove the ſheriff's warrant on the writ againſt him.

THIS was an action on the caſe for maliciouſly holding the Plaintiff to bail for 15*l.* when nothing was due. The Plaintiff proved the affidavit of debt, the writ, and the arreſt by the officer, but could not prove the warrant by virtue of which he was arreſted.

Mingay for the Defendant objected that this was a neceſſary link in the chain of evidence.

Gibbs for the Plaintiff contended that the ſheriff's return of *cepi corpus* appearing on the back of the writ, and it being entered in the judgment of *non pros* that the Plaintiff was arreſted and held to bail, ſufficiently proved the arreſt to have been made under the writ.

Lord KENYON ſaid that as againſt the preſent Defendant, this was no evidence of the arreſt having been under the writ. The return of *cepi corpus* was made by the ſheriff, without any privity of the then Plaintiff, and the judgment of *non pros* was entered by the Defendant in that cauſe.

The Plaintiff was non-ſuited (*a*).

(*a*) *Vide Blatch* v. *Archer*, *Cowp.* 68.

GOODACRE *v.* BREAME.

A man who is proved to be a partner with the Defendant cannot be examined as a witneſs to prove that he only is liable.

ASSUMPSIT for goods ſold and delivered. The Plaintiff's witneſs ſwore that the Defendant

and

and his brother *William Breame* were partners in trade, and that theſe goods were ſold to them in partnerſhip.

The Defendant called *William Breame* to prove that the goods were ſold to him, and that the Defendant had no concern in the purchaſe of them, otherwiſe than as his ſervant.

Lord KENYON. He is not a witneſs to prove this; for he comes to defeat the action of the Plaintiff, againſt a man who is proved to be his partner, and by diſcharging the preſent Defendant, he benefits himſelf, as he will be liable to pay a ſhare of the coſts to be recovered by the Plaintiff in this cauſe.

Verdict for the Plaintiff.

MACDONALD *v.* STEELE Eſq. and Another.

Monday Feb. 25th.

The king may at any time ſtop the half pay of an officer in the army by ſignifying his pleaſure that it ſhall be no longer paid.

THIS was an action on the caſe againſt the Defendants as paymaſters general of the forces, for not giving their draft on the bank for a ſum of money due to the Plaintiff for his half pay (*a*).

It appeared that the Plaintiff ſtill continued on the liſt of half pay officers, but the Defendants proved that the Plaintiff being indebted to the agents of the regiment in a large ſum of money, on account of money over-drawn by him, they entered a *caveat* to prevent his receiving his half pay; and in conſequence of that

(*a*) *Vide Lidderdale* v. *Duke of Montroſe, and Another*, 4 *T. Rep.* 248.

caveat

caveat Sir *George Yonge* the ſecretary at war, ſent a letter to the pay office ſignifying his *Majeſty*'s pleaſure that the pay ſhould not be continued to the Defendant longer than *Chriſtmas* 1789.

Erſkine for the Plaintiff ſaid that the pay appeared to have been ſtopped before the *King*'s pleaſure was ſignified. The pay office could not ſtop the payment on account of the debt due to the agent, though if the agent was indebted to the crown an extent in aid might have ſecured this money. He admitted that the crown had the abſolute controul of the army, but this ſum of money having been appropriated by *Parliament* for the expreſs purpoſe of paying the forces, the *King* could not, merely by ſignifying his pleaſure deprive the Plaintiff of the money ſo appropriated.

Lord KENYON ſaid, he was clearly of opinion that the pay office could not ſtop for the debt due to the agent. If the public had a demand on the Plaintiff that might be ſet off againſt the preſent action. But his *Majeſty*'s pleaſure ſuperſedes all enquiry as he has the abſolute direction and command of the army. It is true *Parliament* has provided a ſum of money, but that is to be diſtributed as the *King* chooſes. The money is under his controul till ſuch time as it is paid out. The *King* cannot take it for his own uſe, but he may prevent it from being paid to a perſon who is not entitled to receive it. The *Caveat* of the agent was merely waſte-paper till adopted by the *King*, when he adopted it, it became his own act; and it is for the honour of government to ſee that money due to an officer is applied to the payment of his debts.

The Plaintiff was nonſuited.

Note.

Note. Mr. *Bearcroft*, in opening the Defendants' caſe, ſaid that the money was not ſtopped on account of a debt due to the agents, but for a debt due to the Crown for money remaining in the Plaintiff's hands as pay-maſter of the 84th regiment; but this was not proved.

GOODE *v.* JONES.

Wedneſday, February 27th. *At Guildhall.*

A book-keeper in *Smithfield* market receiving money for beaſts ſold there, is liable to pay ſuch money to the owner of the beaſts, and cannot apply it in payment of a debt due to him from the faleſman.

ASSUMPSIT for money had and received.

The Plaintiff, a grazier in the country, had ſent three oxen by *Cooke* his drover, to *Smithfield* market, to be ſold by a faleſman there. *Holbeach* the faleſman employed the Defendant as his book-keeper, and he was alſo employed by ſeveral other faleſmen. On the evidence it appeared that it was the buſineſs of the book-keeper to receive the money from the purchaſer, and keep an account of the beaſts ſold, diſtinguiſhing what each beaſt was ſold for, and to whom it belonged. When that is done the faleſman ſends an order to the book-keeper, deſiring him to pay the money to the drover.

In the preſent caſe, *Holbeach* the faleſman being indebted to the Defendant, he refuſed to pay the money received for the Plaintiff's cattle to him, inſiſting that he had a right to retain the money received by him on that account, to ſatisfy the debt due to him from *Holbeach*. *Holbeach* became inſolvent, and the Plaintiff brought the preſent action.

Erſkine, for the Defendant, contended that there was no privity between the Plaintiff and the Defend-

ant. The Defendant kept his account with *Holbeach* only, and the Plaintiff could only call on him for the money. This is much like the caſe of a banker. If a ſum of money is paid into his hands for the uſe of a factor, it will never be contended that the principal may maintain an action againſt him. He offered to call witneſſes to prove that by the univerſal cuſtom of the market the book-keeper was conſidered as the debtor of the ſaleſman, and not of the grazier, with whom he had no connexion.

Lord KENYON ſaid, he never was clearer in any caſe than the preſent. By the common law of the land the Plaintiff is entitled to receive this money from the Defendant, and no cuſtom whatever can deprive him of it. There is not the leaſt ſimilitude between the caſe of a banker and the preſent Defendant. No privity whatever exiſts between the banker of a factor, and the principal whom he never heard of, but this Defendant knew that he was receiving this money for the uſe of the Plaintiff: he entered his name in his book, and diſtinguiſhed how much was due to him.

Verdict for the Plaintiff.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY (*a*) TERM

33 GEORGE III. 1793.

COLE and Another *v.* BLAKE.

Monday, June 24th. At Weſtminſter.

If on a tender being made, the creditor inſiſts on receiving a larger ſum of money, he cannot afterwards object to the formality of the tender on account of the debtor having required a receipt.

THIS action was brought to recover a ſum of 15 *l.* 2 *s.* which the Plaintiffs claimed to be due to them for work and labour done as ſurveyors. The Defendant pleaded a tender of ten guineas.

It clearly appeared that the Plaintiffs were not entitled to receive more than ten guineas, but the witneſs who proved the tender, on his croſs examination ſaid, that he believed he had aſked for a receipt in full, and added that he ſhould not have paid the money unleſs the Plaintiffs would have given ſuch receipt. But he had ſaid further that the Plaintiffs inſiſted on payment of 15 *l.* 2 *s.* for this work, and did not pretend to have any other demand on the De-

(*a*) Every caſe which came before the Court at the *Sittings after Eaſter Term*, 33 *Geo.* 3. has been already reported by M. *Eſpinaſſe*.

fendant, or object to the informality of the tender on account of the receipt being demanded.

Lord KENYON was clearly of opinion that the tender was proved. His Lordſhip ſaid that it had been determined, that a party tendering money could not in general demand a receipt for the money. There had been one caſe indeed in the *Exchequer*, in which Sir *Watkin Williams* was a party, where it was determined that the King's Receiver was obliged to give a receipt, but that was an exception to the general rule. In this caſe, however, the diſpute between the Plaintiffs and the witneſs was not whether a receipt ſhould be given or not, but whether the ſum tendered was ſufficient; and, as it clearly appeared on the Plaintiffs' own evidence that the ſum tendered was ſufficient to ſatisfy the whole demand, he was of opinion the Defendant was entitled to a verdict on the plea of tender.

Verdict for the Defendant (*a*).

(*a*) *Vide Smith* v. *Black*, *ante* 88.

JACKSON *v.* ATTRILL.

The ſtatute of the 24 *Geo.* 2. againſt ſelling liquors in quantities under the value of 20 *s.* does not extend to liquors ſold for the purpoſe of being ſold again.

ASSUMPSIT for the uſe and occupation of part of a houſe, and for goods ſold and delivered.

The Plaintiff was a liquor merchant, and the Defendant took one ſide of a houſe belonging to him, the other ſide being occupied by one *Eaton*, who ſold liquors

liquors on the account of the Plaintiff. The Defendant kept an eating-houſe, and the liquors conſumed by the cuſtomers there, were had from *Eaton*, as they were wanted. Many of the items, in the bill, for liquors were under 20*s*. By the ſtatute 24 *Geo*. 2. *c*. 40. *ſ*. 12. it is enacted, "that no perſon or perſons "whatſoever ſhall be intitled unto or maintain any "cauſe, action or ſuit for, or recover either in law or "equity any ſum or ſums of money, debt or demands "whatſoever for or on account of any ſpirituous li-"quors, unleſs ſuch debt ſhall have been, and *bona* "*fide*, contracted at one time to the amount of 20*s*. "or upwards: nor ſhall any particular article or item "in any account or demand for diſtilled ſpirituous "liquors be allowed or maintained, where the liquors "delivered at one time and mentioned in ſuch article "or item ſhall not amount to the full value of 20*s*. "at the leaſt, and that without fraud or covin."

Garrow, for the Defendant, contended that the Plaintiff could not recover in the preſent action for ſuch liquors as were ſold in quantities of leſs value than 20*s*. They were ſold directly in the teeth of this act of parliament, which is poſitive and without any qualification or exception.

Lord KENYON thought this caſe did not fall within the miſchiefs intended to be remedied by this act of parliament, the intent of which was to prohibit the ſale of ſuch ſmall quantities to the *conſumer*. This was done for the purpoſe of preventing the pernicious effects of dram drinking, which had been found extremely injurious to the lower orders of ſociety. In the preſent caſe the liquors were not ſold to the De-

fendant for his own conſumption, but for the uſe of the gueſts reſorting to his houſe in the way of his trade, and therefore, in his Lordſhip's opinion, not within the act of parliament. His Lordſhip ſaid that he would take a note of the objection, and the Defendant might move the Court if he thought proper.

Verdict for the Plaintiff. (*a*)

(*a*) I believe the Defendant did not move the Court.

Tueſday, July 20. At Weſtminſter.

When a man brings an action for money had and received to recover fees received by the Defendant, he muſt ſhew that ſuch fees belong to the office which he claims.

GREEN *v.* HEWETT.

ASSUMPSIT for money had and received. The action was brought for the purpoſe of trying the Plaintiff's right to the office of Uſher and Cryer of the Court of King's Bench, which he claimed as the grantee of the crown. The Defendant admitted the Plaintiff's right, but claimed the office of under Uſher, as an independent and diſtinct office from that of the Chief Uſher and Cryer.

The under Uſhers and Cryers of the Court of King's Bench are diſtinct officers from the Chief Uſher and Cryer, and not dependant on him *Comme ſemble.*

Bearcroft, in his opening for the Plaintiff, ſaid it was clearly competent to the principal to execute by deputy, and that it was alſo clear that if a principal appoints a deputy, the appointment falls on the death of the principal. That the perſon who appointed the Defendant being dead, his office was at an end, and the Plaintiff had a right to appoint any other deputy. It was convenient it ſhould be ſo, for the principal would be anſwerable for the deputy civilly, even ſhould he be guilty of extortion. He ſaid that a deputy

puty Teller of the Exchequer had contended that his office was independent of that of his principal, but he was unſucceſsful.

The Plaintiff then proved a *patent* dated 27 *Car.* 2. another in 3d of *W. & M.* and a third on the 29th of *April*, 25 *Geo.* 3. whereby " the reverſion of the office " of Uſher and Cryer of the Court of King's Bench," after the death of *John Collier*, was granted to *John Cranſton*, and the next reverſion, ſubject to the lives of the ſaid *John Cranſton* and *John Collier*, to *Milward Rowe*. *John Cranſton* being in poſſeſſion of the office, and *Milward Rowe* being intitled to the reverſion, they by deed poll appointed the Defendant " one of " the Deputy Uſhers of the Court, to hold and exer- " ciſe the office of a Deputy Uſher of the ſaid Court " in all things which to that office only belong, *ſo* " *long as he ſhould live, and to take all wages, fees and* " *regards which belong to the office of a Deputy Uſher*, " and have been anciently due and accuſtomed to be " paid for the exerciſe of the ſaid office," and the Defendant at the ſame time ſigned a paper, whereby after receiving the appointment he " acknowledged " and agreed that ſuch appointment was not un- " derſtood to contain any warranty or aſſurance from " the ſaid *John Cranſton* and *Milward Rowe*, or either " of them, for his holding the ſaid place or office " longer than the ſaid *John Cranſton* and *Milward* ' *Rowe*, or the ſurvivor of them, ſhould happen to ' live, in caſe any further Cryer or Uſher ſhould be appointed by his Majeſty or any of his ſucceſſors who ſhould have power to remove him from his ſaid office."

The Plaintiff next proved a grant of the reverſion to him on the 26th of *February*, 28 *Geo.* 3. which grant, like all the others, granted the reverſion of the office to him "to have, occupy and enjoy, and exer-"ciſe the ſaid office unto him the ſaid *William Green*, "by himſelf *or his ſufficient deputy or deputies*, with all "and ſingular wages, fees and regards, anciently due "and accuſtomed upon the exerciſe of the ſaid "office."

The inquiſition taken in the year 1730 as to the fees due to different officers is concluſive evidence.

Lord KENYON aſked what appeared from the inquiſition taken in the year 1730 as to the fees claimed by theſe officers? When the *Cuſtos Rotulorum* died, which made room for Sir *David Lindſay*, it occurred to Lord *Mansfield* that the office of Deputy failed, and he doubted whether Mr. *Filmer* was not out, but a learned gentleman at the bar ſtating that in that inquiſition the office was treated as a diſtinct office from that of the principal, he was ſuffered to continue in his office.

In a late caſe on the petty bag fees that inquiſition was conſidered as concluſive evidence by all the gentlemen of the bar, and ſo treated by me.

The Plaintiff proceeded in his evidence, and proved the death of *Milward Rowe* on *February* 7, 1793, upon whoſe death the Plaintiff appointed four deputies, who came into court with gowns on for the purpoſe of aſſerting their right to, and doing the duties of the office. He alſo proved that the Defendant had re received money for the juſtification of bail, and o the trials of cauſes.

Erſkine, for the Defendant, ſaid that he meant contend that the offices of Chief Cryer and Un Cryer, were diſtinct and different offices, and that e

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latter were not deputies to the former, but entirely independent of him. That it was ſo conſidered in the year 1730, when the inquiſition was taken, for the fees due to each were contained in ſeparate liſts. (*a*) By that inquiſition it appeared, that all fees taken in court belonged wholly to the under-uſhers and criers, and that the chief uſher and cryer was entitled only to 4*d.* for every judgment, and 4*d.* on every ſpecial or common bail, which amounted to 400*l. per ann.*; and as no ſuch fees had been taken by the Defendant, he contended the Plaintiff muſt be called.

Lord KENYON. I will not ſay how far it is prudent in the Plaintiff to bring his right to a ſinecure place thus publicly into diſcuſſion. The old way of trying queſtions of this kind was by an aſſize, but that mode is now laid aſide, and this more compendious form of action adopted in its ſtead. This is a good form of action to try the Plaintiff's title to the office, but it behoves the Plaintiff to ſhew that he is entitled to the fees which the Defendant has received. He muſt ſhew what the limits of his demand are. But what proof has been given in this caſe, that any fees belonging to the uſher of the Court of King's Bench have been received by the preſent Defendant? As far as the inquiſition goes, his fees are deſcribed, and they contain nothing that will include the fees now claimed. In many caſes, the office of the deputy depends on the office of his principal, and ceaſes with it, but not always. The whole argument in this caſe reſts on aſſumption. It has been aſſumed, though not proved, that the Under Uſhers are mere deputies of the Chief Uſher. If the word Deputy is uſed

(*a*) See the Liſts preſented to the Houſe of Commons. p. 27. No. 12, and p. 32.

in

in the patent inſtead of Under Uſher, it will not affect the caſe if it appears from the nature of the office that he is an independent officer. Many officers have power to grant more ſtable offices than their own. The Chancellor appoints the Maſters in Chancery and Curſitors; yet if the *King* was to exerciſe his right of diſplacing the preſent Lord Chancellor, that would not affect the Maſters in Chancery or Curſitors appointed by him. The caſe of the Teller of the Exchequer does not apply; it was clearly proved in that caſe, that he was a mere ſervant. There is no ground for ſaying that this Defendant has received one farthing belonging to the Plaintiff; even if the fees were improperly received by the Defendant, it does not follow that they belong to the Plaintiff; to ſupport this action for them, he ſhould ſhew expreſsly that he is entitled to them. I ſay nothing of the Act of Parliament, but it is well worth Mr. *Green*'s while to conſider whether theſe are not officers independent of him. The acknowledgment ſigned by the Defendant does not go in derogation of his life eſtate, if he has ſuch an intereſt, it was only meant to avoid a warranty.

Nonſuit.

Wedneſday, July 3d. *At Guildhall.*

HAWKINS and Others *v.* RUTT and Another.

A perſon remitting money by the poſt ſhould deliver the letter at the general poſt-office, or a receiving houſe appointed by that office, and not to a bell-man in the ſtreet.

ASSUMPSIT for goods ſold and delivered. The Plaintiffs had deſired the Defendants to remit them the debt, for which this action was brought,

by

by the poſt; and the Defendants had accordingly incloſed bills of exchange of ſufficient value to ſatisfy it, in a letter. This letter was delivered to the Bell-man in the Street, but never came to the hands of the Plaintiffs, nor could they trace any of the bills.

The Defendants' counſel contended that this was a good payment. The bills they ſaid were remitted in the mode pointed out by the Plaintiffs themſelves and at their riſk.

Lord KENYON. The Defendants have not, in this caſe, uſed due caution. They ought to have delivered the letter at the general Poſt-office in *Lombard Street*, or to one of the houſes authoriſed by that office to receive letters with money, and not to a Bell-man in the Street. Delivering letters with money, or bills in them, to a man of that deſcription, is a temptation to him to be diſhoneſt. Had the Defendants delivered the letter at a proper office, I ſhould have thought that this was a very good remittance, but I do not think the Plaintiffs ought to be charged with money remitted as this was.

Verdict for the Plaintiffs.

STEVENS and Others *v.* THACKER.

THIS was an action by the indorſee of a bill of exchange againſt the acceptor.

If the holder of a bill of exchange agrees not to ſue the acceptor upon his making affidavit that the acceptance is a forgery, and ſuch affidavit is accordingly made and ſworn, he cannot afterwards bring an action on the bill, though the affidavit is falſe. *Aliter* if the affidavit is not ſworn.

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When the bill was produced to the Defendant for payment, he ſaid that the acceptance was a forgery, and offered to make an affidavit that he had never accepted the bill. The Plaintiffs at firſt agreed not to ſue the Defendant on the bill if he would make the affidavit offered by him; but being afterwards convinced that the Defendant had accepted the bill, they refuſed to receive the affidavit, and brought this action. The affidavit had been drawn and ingroſſed, but not ſworn.

Erſkine for the Defendant contended, that the Plaintiffs having agreed to accept the Defendant's affidavit as evidence that he was not the acceptor of the bill, could not afterwards recede from the agreement; and mentioned a caſe wherein Lord *Mansfield* had decided, that the Defendant might diſcharge himſelf by ſuch an affidavit.

Lord KENYON. Had the Defendant ſworn the affidavit, I ſhould have held that he had diſcharged himſelf from the preſent action, though ſuch affidavit had been falſe, for the Plaintiffs, who had agreed to accept that affidavit as evidence of the fact, ſhould not after having induced the Defendant to commit the crime of perjury, maintain an action on the bill. But as in the preſent caſe, the Defendant had not ſworn the affidavit, he ſtill remains liable to the Plaintiffs' action unleſs he can prove the acceptance a forgery.

The Defendant calling no witneſſes, the Plaintiffs had a verdict.

DICK *v.* LUMSDEN.

Friday, July 5th. At Guildhall.

TROVER for a quantity of beef and pork, which had been delivered to the Defendant at *Newry* in *Ireland*, to be conveyed in a ſhip, of which he was maſter, to *London*.

If *A.* has an equitable title to goods on board a ſhip, and *B.* knowing of ſuch title gets an indorſement of the bill of lading he cannot recover ſuch goods in an action of trover, but the captain will be juſtified in delivering the goods to *A.*

The proviſions in queſtion were ſent by *Thompſon & Co.* from *Newry*, to *Euſtace* and *Holland* their factors in *London*, for the purpoſe of being ſold; and on the 10th of *January* 1793, *Thompſon & Co.* wrote to *Euſtace* and *Holland* to make an inſurance, and ſaid, that they would ſend the bill of lading. They accordingly ſent the bill of lading on the 14th of that month, *not indorſed*, but with the name of *Euſtace* and *Holland* written on the back. The inſurance was made on the 15th, and *Euſtace* and *Holland* then wrote to *Thompſon & Co.* for an indorſement of the bill of lading. By a letter dated the 2d of *February*, *Thompſon & Co.* anſwered, that *if the bill of lading was not indorſed it was a miſtake, and that they would ſend an indorſement*; upon which *Euſtace* and *Holland* ſold the proviſions to *Boehm* and *Taylor*.

Thompſon & Co. had drawn bills on *Euſtace* and *Holland*, and they not being able to pay them when they became due, the Plaintiff paid them for the honour of *Thompſon & Co.* the drawers, of whom he was in other reſpects a creditor; and *having knowledge of all the above-mentioned tranſactions*, he wrote to *Thompſon & Co.* for an indorſement of the bill of lading, which they ſent him. He then demanded the proviſions of the

the Defendant, but *Boehm* and *Taylor* having indemnified him, he delivered the proviſions to them.

Erſkine for the Plaintiff contended, that the Defendant was bound to deliver the goods to the indorſee of the bill of lading, and could not take upon himſelf to judge of the Plaintiff's title to them. He compared the caſe to one which he ſaid had been determined by Mr. Juſtice *Gould* on the circuit; who held, that a carrier having a mill-ſtone directed to one man, could not take upon himſelf to deliver it to another perſon, who he thought had a better title. *Boehm* and *Taylor* had no legal title to theſe proviſions, whatever right they might have in equity.

Lord KENYON. The Plaintiff knowing all the circumſtances of this caſe, could not by any ſubſequent act of his own, take the goods in queſtion out of the poſſeſſion of *Boehm* and *Taylor*. Though between perſons ignorant of the tranſactions, an indorſement is the only transfer, yet where parties know the whole circumſtances, a letter of this kind is a ſufficient transfer of the property. The bills that have been mentioned, were not drawn preciſely for theſe goods, but on the general account. Here the factor transferred the property, and having a competent authority ſo to do, it was not eſſentially neceſſary that he ſhould have the poſſeſſion of the goods or an indorſement of the bill of lading. This is much like the caſe of a regiſter county, as to the purchaſe of real property. If a man doth not regiſter his purchaſe deeds, and another perſon buys the eſtate *without notice* of the previous purchaſe, it will not

not affect him; but if he knows of ſuch purchaſe he ſhall not avail himſelf of the neglect to regiſter. (*a*)

The Plaintiff was nonſuited. (*b*)

(*a*) *Vide Hine* v. *Dodd*, 2 *Atk.* 275.

(*b*) *Vide Caldwell and Others* v. *Ball*, 1 *Term Rep.* 205. *Hibbert and Carter*, *ibid.* 745.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM

34 GEORGE III. 1793.

Wednesday, Decem. 4th. At Weſtminſter.

HEARN and Another *v.* TOMLIN.

Where a man agrees to purchaſe premiſſes on an aſſurance that the perſon of whom he purchaſes has a long term in them, and on the faith of ſuch aſſurance at a conſiderable expence enters into the poſſeſſion of them, he ſhall not, on his refuſing to complete his purchaſe (on account of the ſeller having a ſhorter term) be charged in an action for uſe and occupation.

THIS was an action for the uſe and occupation of a wharf.

The Plaintiffs had agreed to ſell the wharf to the Defendant, and ſtated that the leaſe had 13 years to run. Under this contract the Defendant entered into poſſeſſion of the wharf; but it being afterwards diſcovered that the Plaintiffs had an intereſt in the premiſſes for three years only, the Defendant refuſed to compleat his purchaſe. The firſt witneſs proved, that ſo far from being a beneficial occupation to the Defendant, he had been put to great expence in removing timber to the wharf which was intended to continue there ſome years.

Lord KENYON. To maintain an action for uſe and occupation, it muſt appear that the occupation has been

been beneficial to the Defendant. This occupation was injurious to the Defendant, who had he been told that the Plaintiffs had only a term of three years in the premiſſes, would never have entered upon them, and the Plaintiffs ſhall not be permitted to make this the ground of an action.

His Lordſhip therefore directed a nonſuit.

UPSDELL *v.* STEWART.

ASSUMPSIT for work and labour as a ſurveyor. The Plaintiff demanded 34*l.* being 5*l. per cent.* on all money charged by, and allowed to the different tradeſmen. The Defendant had paid one half of the ſum demanded into court contending that 2 ½ *per cent.* was a ſufficient compenſation for the buſineſs the Plaintiff had done. He had done nothing more than meaſure the work, and ſettle the bills, not being at all employed in building the houſe.

A ſurveyor is to be paid according to his labour and not according to the amount of the bills he looks over and ſettles.

Garrow for the Plaintiff, offered to call witneſſes to prove that the uniform practice of ſurveyors was to charge 5*l. per cent.* on all money allowed to the workmen; and inſtanced the caſe of ſurgeons and others, whoſe fees were ſettled by the evidence of profeſſional men, as to the uſual charge on ſuch occaſions.

Lord KENYON. The Plaintiff is entitled to a reaſonable compenſation for his labour, but he is not to eſtimate that by the money laid out by the Defendant in finiſhing his building.

I am bound to give my opinion on the matter of law, the jury will anſwer as to the fact. I am enabled to ſtate from the record what is the true queſtion between the parties. The Plaintiff ſtates his demand to be "as much as he *reaſonably* deſerves to have for his "work and labour." Does he *reaſonably* deſerve to have this exorbitant demand? As to the cuſtom offered to be proved, the courſe of robbery on *Bagſhot Heath* might as well be proved in a court of juſtice. It ought not, nor cannot be ſupported.

On his Lordſhip expreſſing himſelf thus ſtrongly, *Garrow* conſented to a nonſuit.

Friday, Dec. 6th.

The proprietor of a public amuſement cannot maintain an action againſt a man for a libel on one of his performers, by reaſon whereof ſhe was deterred from appearing on the ſtage.

ASHLEY *v.* HARRISON.

THIS declaration ſtated, that the Plaintiff during the time of *Lent* 1793, cauſed to be performed every *Wedneſday* and *Friday* night, by divers ſingers and muſicians at a certain place of public amuſement called *Covent Garden Theatre*, certain muſical performances for the entertainment of the public for certain rewards paid to him for admiſſion into the ſaid place of public amuſement by thoſe perſons who were deſirous of hearing the ſaid muſical performances; by means whereof he derived great gains, *&c.* yet the Defendant knowing the premiſſes, but contriving to leſſen the profits, *&c.* and to terrify, deter, *&c.* a certain public ſinger called *Gertrude Elizabeth Mara*; who had been before that time retained

tained by the Plaintiff to ſing publicly for him at the ſaid place, *&c.* from ſo ſinging; wrote and publiſhed a certain falſe and malicious paper writing of and concerning the ſaid *G. E. Mara*, and of and concerning her conduct, as ſuch public ſinger as aforeſaid, containing therein, *&c.* The libel was then ſet out, and the declaration concluded, that by reaſon thereof the ſaid *G. E. M.* could not ſing without great danger of being aſſaulted, ill-treated, and abuſed, and was terrified, deterred, prevented, and hindered from ſo ſinging; and that the profits of the amuſement were thereby rendered much leſs than they otherwiſe would have been.

On the opening of the cauſe, Lord *Kenyon* expreſſed his diſapprobation of the action, but on *Erſkine* for the Plaintiff ſuggeſting, that the objection was on the record, his Lordſhip permitted the cauſe to proceed.

The declaration was proved, and Madame *Mara* ſaid, that "ſhe did not chuſe to expoſe herſelf to contempt again, and therefore refuſed to ſing."

When the Defendant's counſel were proceeding to their defence, they were ſtopped by Lord *Kenyon*, who ſaid. This action is unprecedented, and I think cannot be ſupported on principle. The injury is much too remote to be the foundation of an action. If this action is to be maintained, I know not to what extent the rule may be carried. For aught I can ſee to the contrary, it may equally be ſupported againſt every man who circulates the glaſs too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the ſtage. If any injury has happened,

pened, it was occaſioned entirely by the *vain fears* or *caprice* of the actreſs. *Madam Mara* ſays, ſhe did not chuſe to expoſe herſelf to contempt again. The action then is to depend entirely on the nerves of the actreſs, if ſhe chuſes to appear on the ſtage again no action can be maintained; if ſhe does not, her refuſal is to be followed with an action. In actions for defamation whereby a woman loſes her marriage, it is not ſufficient to prove that ſhe was a virtuous woman, and one who might reaſonably hope to have ſettled well in life; but a marriage already agreed upon muſt be ſhewn to have been loſt. (*a*)

The Plaintiff was nonſuited. (*b*)

(*a*) *Vide Cro. Eliz.* 787. *Cro. Jac.* 422. *Lutw.* 1256. *Lateh.* 218. (*b*) *Vide Tarlton* and Others v. *Mr Gazley, poſt* 205.

Saturday, Dec. 7th.

Doe dem Williams and Another v. Pasquali.

A refuſal to pay rent to a devi-ee in a will which was conteſted is not ſuch a diſavowal of the title as to entitle ſuch deviſee to maintain an ejectment without giving a previous notice to quit.

THE Defendant came into poſſeſſion of the premiſſes for which this ejectment was brought, as tenant to *Daniel Morgan* who deviſed the ſame to the leſſors of the Plaintiff upon certain truſts mentioned in his will. The will of *Morgan* had been conteſted in the Eccleſiaſtical Court, and it was proved that the Defendant had frequently ſaid he was ready to pay his rent to any perſon who was entitled to receive it; but doubting whether the will was duly made, he had refuſed to pay it to the leſſors of the Plaintiff. He had paid part of this rent to a man of the name of *Parke* who had collected rents for *Morgan* in his life-time.

The

The Plaintiffs' counſel contended that this refuſal of the Defendant was ſuch a diſavowal of the leſſors of the Plaintiffs' title, as entitled them to conſider the Defendant as a treſpaſſer, and eject him without any notice to quit.

Lord KENYON ſaid, this was not ſuch a caſe as rendered a notice unneceſſary. It had been held that if a tenant put his landlord at defiance, he might conſider him either as his tenant or a treſpaſſer, and in the latter caſe need not give him a notice to quit before he brought his ejectment: but that was not the caſe here, for the Defendant profeſſed himſelf ready to pay to any perſon who was entitled to receive; nay it is proved that he actually paid a conſiderable part of his rent to *Parke*, who was the collector of *Morgan* in his life-time, and the only perſon he could truſt.

The Plaintiff was nonſuited (*a*).

(*a*) *Vide Bull. Ni. Pri.* 96.

PULLER and Others, Aſſignees, &c. of FORBES and GREGORY Bankrupts *v.* ROE and Others.

Monday, Dec. 16th. *At Guildhall.*

ASSUMPSIT on a promiſſory note for 9800 *l.* dated *March* 8, 1793, payable to *Charles Caldwell* Eſq; *and Company*, or order, and by them indorſed to the bankrupts under the firm of "Meſſrs. *B. Burton*, "*Forbes* and *Gregory*."

A. B. C. and *D.* are in partnerſhip together, and *C.* and *D.* alſo trade on their ſeparate account. The partnerſhip of *A. & Co.* becomes indebted to *C.* and *D.* and to ſatisfy ſuch debt they indorſe a note given to *them*. In an action by *C.* and *D.* as indorſees of that note the debtor may ſet-off any demand he has againſt *A. & Co.*

The Defendants pleaded the general iſſue, and gave notice of ſet off.

Bartholomew Burton, and the bankrupt *Forbes*, carried on the buſineſs of general merchants in *London*, from the year 1762 to 1769, and on the 31ſt of *January* 1769, the bankrupt *Gregory* was admitted a partner in the houſe. *Burton* died on the 27th of *April* 1770, but the buſineſs was ſtill carried on under the old firm of "*Burton*, *Forbes* and "*Gregory*."

On the 21ſt of *May* 1774, *Forbes* and *Gregory* became partners with *Charles Caldwell* and *Thomas Smith*, in a banking-houſe at *Liverpool*, under the firm of *Charles Caldwell & Co.* and that partnerſhip continued to the time of their reſpective bankruptcies, which happened in the month of *March* 1793, *viz.* that of *Forbes* and *Gregory* on the 16th, and that of *Caldwell & Co.* on the 18th of that month.

The two houſes of *Forbes* and *Gregory* and *Caldwell & Co.* were diſtinct and ſeparate houſes; *Caldwell* and *Smith* having no concern in the buſineſs carried on by *Forbes* and *Gregory* in *London*, though the latter were partners in, and equally concerned with *Caldwell* and *Smith* in the banking buſineſs carried on at *Liverpool*, under the firm of "*Charles Caldwell & Co.*"

Caldwell and *Smith* were alſo in partnerſhip with the Defendants under the firm of *Roe & Co.*; which company kept a banking account with the houſe of *Caldwell & Co.* at *Liverpool*; and that houſe being in advance for the Defendants, they, on the 8th of *March* 1793, made and ſigned the note on which the action was brought; and the houſe of *Caldwell & Co.* at *Liverpool*, being indebted to *Forbes* and *Gregory* to a large amount, indorſed the note to them.

This

This note was given for the balance then ſuppoſed to be due from the Defendants to *Caldwell & Co.* but it was afterwards diſcovered that a ſum of 3859 *l.* 1 *s.* with which the Defendants were debited for ſundry bills ſuppoſed to have been drawn by *Major* (*Caldwell & Co*'s. agent at *Truro*) was improperly charged; ſuch bills never having been in fact drawn.

Bower, for the Defendants, contended that *Forbes* and *Gregory* being partners in the houſe of *Caldwell & Co.* muſt take this note, charged with every incumbrance which it would be liable to in the hands of *Caldwell & Co.* and therefore that the Defendants had a right to deduct the above-mentioned ſum of 3859 *l.* 1*s.* and to ſet off not only the ſum of 80 *l.* 8 *s.* 10 *d.* due to them from *Forbes* and *Gregory* as the *acceptors* of ſeveral bills drawn by *Caldwell & Co.* on them; but alſo the ſum of 260 *l.* 18 *s.* 3 *d.* due to the Defendants from *Caldwell & Co.* on ſeveral bills drawn by *Caldwell & Co.* on *Forbes* and *Gregory*, which were *not accepted* by them. Some of theſe bills had been drawn by *Caldwell & Co.* for checks drawn upon them by the Defendants as their Bankers; and the bills not being paid when they became due, in conſequence of the failure of *Caldwell & Co.* and *Forbes* and *Gregory*, the Defendants were obliged to take them up, and had paid to the ſeveral holders of them the full value thereof. The others were either payable to the Defendants, or indorſed to them by the reſpective payees.

Erſkine for the Plaintiffs, contended that *Forbes* and *Gregory* being a diſtinct and ſeparate houſe, and creditors of *Caldwell & Co.* to an amount much beyond that for which this note was given, were not liable to pay the before-mentioned ſum of 3859 *l.* 1 *s.* or the bills which they had *not accepted*. For payment of thoſe

ſums the Defendants muſt look to the eſtate of *Caldwell & Co.* who were their debtors.

Lord KENYON. This note was given to *Caldwell & Co.* as a banking-houſe, and conſtitutes an article in the accounts between the Defendants and them. They cannot *as between themſelves* raiſe a diſtinct account, though they might indorſe to a third perſon. The affairs of the Company are in preſumption of law kown to all the partners, and all are equally liable. The Defendants ſend this bill to *Caldwell & Co.* to cancel part of the debt due to them: Can they, by an act between themſelves, divert this money to another purpoſe, and leave the whole of the Defendant's debt outſtanding?

The Plaintiffs, therefore, had a verdict for the balance due to them, after deducting the ſeveral before-mentioned ſums of money, and alſo the ſum of 1024 *l.* which it was admitted that *Forbes* and *Gregory* had received of the Defendants previous to their bankruptcy. In the following term a motion was made for a new trial, but the Court refuſed to grant a rule to ſhew cauſe.

Wedneſday, December 18th.

MATTHEWS qui tam *v.* GRIFFITHS and Others.

If a country banker diſcounts a bill takes in credit for the whole time it has to run, and inſtead of paying money for the bill gives notes payable in *London* at three days after ſight, ſuch country banker is guilty of uſury.

THIS was an action on the ſtatute againſt uſury. The declaration contained many counts on different loans.

The

The Defendants being bankers at *Portſmouth*, and Mrs. *Stewart* the proprietor of a conſiderable ſalt-work near that place; on the 21ſt of *December*, 1792, *Thomas Knott*, the ſervant of Mrs. *Stewart*, drew a bill for 600 *l.* on *Sedley* her agent in *London*. The bill was payable to the Defendants or order thirty days after date, and immediately it was drawn, taken to the Defendants, who gave their note for 600 *l.* payable three days after ſight at *Fry* and *Robinſon's*, in *London*. For this the Defendants received a diſcount of 5 *per cent.* calculating on the thirty days the bill had to run, but making no deduction on account of the three days the note had to run after ſight, or of the three days grace which the bankers took thereon. *Knott*, on croſs examination, admitted that the money to be received on the draft was intended to be remitted to *London*, but ſwore that no money was offered to him by the Defendants, but that they gave him the note at three days ſight, without aſking any queſtions as to the mode in which he would be paid the money. All the other tranſactions between the parties were of the like nature, and another witneſs proved that theſe notes, payable at three days ſight, were diſcounted when they arrived in *London*.

Lord KENYON ſaid he was clearly of opinion that this was an uſurious contract, whether the perſon diſcounting the bill choſe to receive a note or money. If Mrs. *Stewart* choſe to have a note payable in town, the Defendant ſhould not have taken intereſt for the time that note had to run, but ſhould compute his intereſt from the time it was payable; and on Mr. *Lubbock* the banker (who was on the Jury) ſaying that whenever

whenever he ſent a bill to *Briſtol*, the drawee ſent a a bill on *London* payable at thirty days after date, his Lordſhip ſaid, that the law in this caſe was clear, and that no uſage whatever could controul it.

On this the parties compromiſed the cauſe, and agreed to withdraw a juror; which done,

Lord KENYON ſaid, Now the cauſe is over I muſt ſay one word for myſelf. I am moſt clearly of opinion that this is uſury. Whether the party conſented or not can make no difference. She was entitled to receive in money the amount of the bill after deducting the intereſt for the time it had to run. The Defendants could not give a note payable in ſix days without deducting from the diſcount the intereſt for thoſe ſix days. There may be caſes where a country banker may be entitled to receive more than 5*l. per cent.*; ſuch was the caſe of the *Sudbury bank*, which came on in this place ſome years ago, and in which my opinion concurred with that of the Jury. But all men, lawyers or not lawyers, muſt agree on this caſe, becauſe here was a ſecond diſcount paid on the notes. The caſe is ſo clear, that no two men in the profeſſion can entertain different opinions on it.

Thurſday, December 19.

WILKES and Others *v.* JACKS.

It is no excuſe for not giving notice to the *indorſee* of a bill of exchange that the acceptor had no effects.

ASSUMPSIT on a bill of exchange, drawn by *Vaughan* on *Euſtace* and *Holland*, and indorſed by the Defendant.

The bill was diſhonoured by *Euſtace* and *Holland*, but no notice of ſuch diſhonour given to the Defendant.

ant. The Plaintiffs' counſel attempted to cure this negligence by ſhewing that *Vaughan* the drawer had no effects in the hands of *Euſtace* and *Holland*.

But Lord KENYON was of opinion that this circumſtance would not avail the Plaintiffs. That rule only extended to actions brought againſt the drawer, the indorſer was in all caſes entitled to notice, for he had no concern with the accounts between the drawer and acceptor.

The Plaintiff then proved a letter of the Defendant's acknowledging the debt, and promiſing to pay it, on which evidence he recovered a verdict.

GRANT *v.* JACKSON, Bart. and Others.

Friday, December 20th.

An admiſſion in an anſwer to a bill filed by *other creditors* againſt the Defendant may be read as evidence againſt him.

If ſeveral are ſued and one plead his bankruptcy, upon which the Plaintiff enters a *nolle proſequi* as to him, he may ſtill give evidence of the admiſſions of ſuch Defendant made before he obtained a certificate.

THIS action was brought on a bill of exchange for 100 *l.* drawn in the year 1768 by *Heſenclever* and Co. on the behalf of the *American Company*, of which company it was admitted the Defendants were ſurviving partners. *Heſenclever* was alſo a Defendant, but having pleaded his diſcharge under a commiſſion of bankruptcy, the Plaintiff had entered a *nolle proſequi* as to him.

Amongſt other evidence the Plaintiff offered the anſwer of *Heſenclever* to a bill filed againſt him in the Court of Chancery by *other creditors*. At the time this anſwer was ſworn, *Heſenclever* had become a bankrupt, but had not obtained his certificate.

Garrow, for the Defendants, objected to this evidence. In the firſt place he ſaid that this being an anſwer

anſwer to a bill at the ſuit of other perſons not parties to this record, was *res inter alios acta*, and therefore could not be evidence in the preſent cauſe. Secondly, that at the time *Heſenclever* put in this anſwer, he had no intereſt to diſpute the Plaintiff's debt, for he had become a bankrupt, and was now not even a party to this record, being diſcharged by the *nolle proſequi*. It was much like the caſe of three being jointly indicted for a felony; if the bill was thrown out by the grand jury, as to one, his confeſſion would be no evidence againſt the others.

Lord KENYON. This anſwer is not admiſſible evidence for all purpoſes. It could not be received to prove the partnerſhip, but when once a partnerſhip is eſtabliſhed, the admiſſion of one may bind all. If *Heſenclever* had obtained his certificate and been diſcharged by it, at the time he put in this anſwer, I think there would have been a formidable objection to the evidence, but at that time he was equally liable with the others. I do not receive it as evidence of a judicial proceeding, but as a naked admiſſion. This is not like the caſe put of a felony, there can be no partnerſhip in a crime.

The Jury found for the Plaintiff, damages 245 *l.* including the principal money, 25 years intereſt, and 20 *l. per cent.* being the damages always allowed on the return of bills to *America*.

Coſts paid to a Defendant in equity ought to be allowed to the Plaintiff in his coſts at law. *Contra ſemble.*

Note. No bill had been filed for a diſcovery by the preſent Plaintiff, but many other perſons had filed ſuch bills, and *Erſkine* having in his addreſs to the Jury complained of the hardſhip of a Plaintiff in equity being obliged to pay the coſts of a diſcovery,

Lord

Lord *Kenyon* obſerved that he had once heard Lord *Mansfield* ſay he thought, in ſuch a caſe, the Court of Law ought to allow the coſts paid to the Defendant in equity as coſts at law, that he was ſtruck with the propriety of the obſervation, and thought it would be a good rule to be adopted.

TARLETON and Others v. Mᶜ GAWLEY.

Saturday, December 21ſt.

An action lies againſt the maſter of a veſſel for purpoſely firing a cannon at negroes, and thereby preventing them from trading with the Plaintiff.

And it is no anſwer to ſuch action that the Plaintiff had not conformed to the law of the country in paying the duty due to the king for his licence to trade.

THIS was a ſpecial action on the caſe. The declaration ſtated that the Plaintiffs were poſſeſſed and owners of a certain ſhip called the *Tarleton*, which at the time of committing the grievance was lying at *Calabar* on the coaſt of *Africa*, under the command of ——— *Fairweather*. That the ſhip had been fitted out at *Liverpool* with goods proper for trading with the natives of that coaſt for ſlaves and other goods. That alſo before the committing the grievance *Fairweather* had ſent a ſmaller veſſel called the *Baniſter* with a crew on board, under the command of one *Thomas Smith*, and loaded with goods proper for trading with the natives, to another part of the ſaid coaſt called *Cameroon*, to trade with the natives there. That while the laſt mentioned ſhip was lying off *Cameroon*, a canoe with ſome natives on board came to the ſame for the purpoſe of eſtabliſhing a trade, and went back to the ſhore, of which Defendant had notice. And that he well knowing the premiſſes, but *contriving and maliciouſly intending to hinder and deter the natives from trading* with the ſaid *Thomas Smith*, for the benefit of the Plaintiffs, with force and arms,

arms, fired from a certain ship called the *Othello*, of which he was master and commander, a certain cannon loaded with gunpowder and shot at the said canoe, and killed one of the natives on board the same. *Whereby the natives of the said coast were deterred and hindered from trading with the said* T. Smith *for the benefit &c. and Plaintiffs lost their trade.*

Erskine, in his opening for the Plaintiffs, distinguished this case from that of *Ashley* and *Harrison* (*a*), where Lord *Kenyon* had held the injury to be too remote to be the foundation of an action; that decision, he said, was founded on principles recognized by the law of *England* from the earliest antiquity. So long since as the days of *Bracton* it was held that to constitute a dureſs in law it must not be "*suspicio cujuslibet* "*vani & meticulosi hominis, sed talis qui possit cadere in* "*virum constantem; talis enim debet esse metus, qui in se* "*contineat vitæ periculum, aut corporis cruciatum.*" (*b*). But in this case the Plaintiff's loss was not occasioned by the vain fears of the negroes, or even the fear of a battery being committed on them, but a fear arising from the danger of life itself.

The Plaintiffs called *Thomas Smith*, who proved the facts stated in the declaration; and further, that the Defendant had declared the natives owed him a debt, and that he would not suffer any ship to trade with them until that was paid; in pursuance of which declaration he committed the act complained of by the Plaintiffs. On his cross examination he admitted that by the custom of that coast no *Europeans* can trade

(*a*) *Ante* p. 194. (*b*) *Brac. l.* 2. *c.* 5.

until

until a certain duty has been paid to the king of the country for his licence, and that no ſuch duty had been paid, or licence obtained by the captain of the Plaintiffs' veſſel.

Law, for the Defendant, contended that the Plaintiffs being engaged in a trade which by the law of that country was illicit, could not ſupport an action for an interruption of ſuch illicit commerce, and compared this caſe to an action brought for interrupting a Plaintiff in his endeavours to ſmuggle goods into this country, or alarming the owner of a houſe which the Plaintiff was about to break into. He alſo objected that this act of the Defendant amounted to a felony, and therefore could not be made the ground of a civil action, but he did not lay much ſtreſs on this objection.

Lord KENYON. This action is brought by the Plaintiffs to recover a ſatisfaction for a civil injury which they have ſuſtained. The injury complained of is, that by the improper conduct of the Defendant the natives were prevented from trading with the Plaintiffs. The whole of the caſe is ſtated on the record, and if the parties deſire it, the opinion of the Court may hereafter be taken whether it will ſupport an action. I am of opinion it will. This caſe has been likened to caſes which it does not at all reſemble. It has been ſaid that a perſon engaged in a trade violating the law of the country cannot ſupport an action againſt another for hindering him in that illegal traffick. That I entirely accede to, but it does not apply to this caſe. This is a foreign law; the act of trading is not itſelf immoral, and a *jus poſitivum* is not

not binding on foreigners. The king of the country and not the Defendant ſhould have executed that law. Had this been an accidental thing, no action could have been maintained, but it is proved that the Defendant had expreſſed an intention not to permit any to trade, until a debt due from the natives to himſelf was ſatisfied. If there was any court in that country to which he could have applied for juſtice he might have done ſo, but he had no right to take the law into his own hands.

The Plaintiffs had a verdict, and the parties agreed to refer the damages to arbitration.

Note. In the beginning of the cauſe the Plaintiffs' counſel propoſed aſking the witneſs whether ſome of the negroes did not aſſign their fear of the Defendant as a reaſon for not trading with the Plaintiffs, but Lord *Kenyon* ſaid that no declaration of the negroes could be received in evidence.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER HILARY TERM,

34 GEORGE III. 1794.

SNELL *v.* PHILLIPS one, &c.

Friday, February 14th. *At Guildhall.*

If a bill filed againſt an attorney in vacation be intitled of the preceding Term, and the Defendant plead the ſtatute of limitations, he may ſhew when it was in fact filed.

ASSUMPSIT on a promiſſory note of hand for 10 *l.* The Defendant pleaded the general iſſue and the ſtatute of limitations.

The bill was filed as of *Trinity* Term laſt, and a witneſs was called by the Plaintiff, who proved a promiſe of payment in *July* or *Auguſt* 1787. He could not ſpeak poſitively in which of thoſe months the promiſe was made, but was ſure it was not later than *Auguſt*.

The Defendant offered evidence, that though entitled of *Trinity* Term, the bill was not in fact filed till *October*.

Shepherd, for the Plaintiff, objected to this evidence, contending that though, for the purpoſes of juſtice, it was competent to a Plaintiff, to prove when

the ſuit was commenced, yet that the preſent Defendant ought not to be permitted to do it for the purpoſe of ſupporting his plea of the ſtatute of limitations.

Lord KENYON ſaid, the evidence ſhould be received on the ſame principle, as it was permitted to a Plaintiff, to reply that a writ teſted in term, was ſued out in vacation according to the practice of the Court. (*a*) The evidence was therefore received, and the Plaintiff nonſuited.

(*a*) *Vide Johnſon and Another, Aſſignees, &c. v. Smith, Executrix*, 2 *Burr.* 960. *Morris v. Pugh et al.* 3 *Burr.* 1241. It is now uſual when a bill againſt an attorney is filed in vacation to make a particular entry. 5 *T. R.* 325.

KNIBBS *v.* HALL One, &c.

It is no objection to the ſet-off of a debt, that the Defendant had commenced an action for the recovery of that debt, before the Plaintiff's cauſe of action accrued.

THIS was an action brought for the uſe and occupation of certain rooms; the Defendant pleaded the general iſſue, and gave notice of ſet-off for buſineſs done as an attorney, *&c.*

The Defendant had brought a croſs action for this bill of coſts, which was made the ſubject of a ſet-off. That debt had accrued, and the action on it was commenced, *before* the debt for which the preſent action was brought, had become due.

Garrow for the Plaintiff, objected that theſe were not ſuch *mutual* debts, at the time of the commencement of the Plaintiff's action, as would entitle the Defendant to ſue the Plaintiff, and alſo to ſet-off his debt. To enable him to do ſo, he contended, that the

the debt for which the preſent action was brought ſhould have been due at the time the Defendant commenced his action againſt the Plaintiff.

Lord KENYON over-ruled this objection; being clearly of opinion, that theſe were *mutual* debts within the meaning of the ſtatute. (*a*)

This and the other cauſe were referred to arbitration.

(*a*) *Vide Baſkerville* v. *Brown*, 2 *Burr.* 1229. 1 *Black.* 293. S. C.

MINETT and Others *v.* ANDERSON.

Monday, March 3d, *At Guildhall.*

ASSUMPSIT on a policy of inſurance on the ſhip *Hercules*, from *Bilboa* to *Rouen*, and until ſhe had been 24 hours moored *in ſafety* there.

If a policy be on a ſhip bound to a foreign port until ſhe is 24 hours moored *in ſafety* there; and previous to ſuch ſhip's arrival at her deſtined port an embargo is laid on all *Engliſh* veſſels in that port, and ſhe on entering it is alſo detained, and her crew made priſoners of war, the aſſured is entitled to recover.

The ſhip arrived at *Rouen* on the 1ſt of *February* 1793, an embargo having been previouſly laid on all *Engliſh* veſſels in that port. The captain went on ſhore the day he arrived, and an embargo was the next day laid on his ſhip. He was afterwards permitted to land his cargo, and delivered it to the conſignees, who were merchants at *Rouen*, but the ſhip was detained as a prize, and the captain and crew allowed ſubſiſtence as *priſoners of war*, from the time of their arrival.

The Defendant offered evidence to prove that no guard was put on board the ſhip, till ſome days after her arrival.

Lord KENYON. That would not alter the caſe. She was as much within the power of the enemy, as if a guard had been put on board the moment ſhe arrived. She could not be ſaid to be 24 hours, or a minute moored in *ſafety*, as far as relates to theſe Plaintiffs; for immediately ſhe entered the port ſhe was to all intents and purpoſes captured by the *French*.

Verdict for the Plaintiffs.

Tueſday, March 4th.

GREEN and Others *v.* ELMSLIE.

If a ſhip be driven by ſtreſs of weather on an enemy's coaſt and there captured, it is a loſs by capture and not by the perils of the ſeas.

THIS action was on a policy of inſurance on the ſhip *Fly* from *Exeter* to *London*. The inſurance was againſt capture only.

The ſhip while on her voyage was driven by a hard gale of wind on the coaſt of *France*, and was there captured by the enemy: ſhe did not receive any damage from the wind.

Erſkine contended, that this was a loſs by the perils of the ſeas, and not by capture, and that therefore the Defendant was not liable on this policy.

But Lord KENYON ſaid, the caſe was too clear to admit of argument; this was clearly a loſs by capture, for had the ſhip been driven on any other coaſt but that of an enemy, ſhe would have been in perfect ſafety.

Verdict for the Plaintiffs.

SMITH and Others Aſſignees, &c. of LEWIS and POTTER *v.* JAMESON and Another.

Friday, March 7th.

ASSUMPSIT for money had and received.

If an aſſignee of a bankrupt be removed and aſſign his intereſt to the other aſſignees, they may maintain an action for money had and received againſt him, to recover the money received by him as ſuch aſſignee. *Comme ſemble.*

Robert Jameſon one of the Defendants, was a joint aſſignee with the Plaintiffs, but was afterwards removed by order of the Lord Chancellor; and then re-aſſigned all his intereſt to the Plaintiffs.

Whilſt he was an aſſignee, he had received ſeveral ſums of money which he had applied to the uſe of himſelf and the other Defendant, (with whom he was in partnerſhip) with the approbation of the other Defendant, who knew that the money was part of the bankrupt's eſtate.

The preſent action was brought under the direction of the Lord Chancellor, to determine whether the eſtates of both Defendants were liable (they having become bankrupts) and they were to be examined as witneſſes, if neceſſary.

Bearcroft objected to the action in point of form. He ſaid that one Defendant having been an aſſignee of the bankrupt's eſtate, was himſelf entitled to receive this money, that *he* could not have maintained an action againſt *himſelf*, and having aſſigned only ſuch an intereſt as he himſelf had, could not in point of form be a Defendant.

Lord KENYON. When an aſſignee aſſigns his intereſt, he deveſts himſelf of all right, and becomes a debtor to thoſe who remain aſſignees. *Choſes in action*

tion have always been conſidered as aſſignable in caſes of bankruptcy. (*a*)

The point on which the Chancellor entertained a doubt was reſerved for the opinion of the court.

(*a*) *Vide* Mr. J. *Buller's* opinion, 5 *Term Rep.* 603. 2 *Co. Bank. Law* 128, and *Wray Aſſignee, &c.* v. *Barwis, ante* 69.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER TRINITY (*a*) TERM,

34 GEORGE III. 1794.

SEDDONS *v.* STRATFORD.

Friday, July 11th, *At Guildhall.*

A man who, at the requeſt of the holder of a note, has put his name upon it and thereby been *obliged* to pay the contents to a *bona fide* holder, may recover the money paid from any perſon whoſe name is on the note, although he knew it was given on an illegal conſideration.

ASSUMPSIT by the Plaintiff as indorſee of a promiſſory note againſt the Defendant, who was the payee and firſt indorſer. Counts for money paid, *&c.*

The note in queſtion was made by *Thomas Bell* and the conſideration on which it was given, premiums for the inſurance of tickets in the lottery. *Stratford* the Defendant indorſed it to *Clode*, who had notice of the illegal conſideration on which it was founded: he offered it to *Cowley* in payment for ſome goods which he bought of him, but *Cowley* refuſing to truſt *Clode* with the goods unleſs he could get the name of ſome other perſon as an indorſer of the note, *Clode* prevail-

(*a*) I have no note of any importance at the Sittings after *Eaſter* Term.

ed on the preſent Plaintiff to indorſe the note, and then paid it to *Cowley*. When the note became due, the Plaintiff was obliged to pay it to *Cowley*. One of the Plaintiff's witneſſes ſwore that the Plaintiff told him he knew the conſideration on which the note was given.

Shepherd for the Defendant objected, that on this evidence the Plaintiff could not recover, for, the note being given on an illegal conſideration, an indorſee to entitle himſelf to recover againſt the indorſer ſhould ſhew that he had paid a valuable conſideration for it.

Lord KENYON. It has been frequently held in the Court of Chancery, that a mere volunteer, who has been obliged to pay money in conſequence of an obligation he has entered into, is entitled to recover that money from the perſon on whoſe behalf he has paid it. The Plaintiff was *obliged* to pay this money to *Cowley* who came fairly and honeſtly by the note, and had a right to recover the value of it, from any perſon who appeared to be a party to it. The Plaintiff derives his title from him, and the Defendant being clearly liable to pay the money to *Cowley*, it is no injury to him to be obliged to repay it to the Plaintiff who has paid it for him.

Verdict for the Plaintiff.

LEDGER *v.* EWER.

If a bill of exchange be given in conſideration of the Defendant entering into partnerſhip with the Plaintiff, and the treaty is afterwards broke off, the Plaintiff is entitled to recover a verdict on the bill to the amount of the damages he has ſuſtained and not to the full amount of the bill.

ASSUMPSIT on a bill of exchange for 100*l.* drawn by the Plaintiff on the Defendant, and accepted by him.

It

It appeared, that this bill of exchange was accepted in conſideration of the Defendant being permitted to enter into partnerſhip with the Plaintiff as a hatter. The Defendant was an indiſcreet young man who had a conſiderable ſum of money, and the Plaintiff having got poſſeſſion of a ſhop, but *no buſineſs* and little money to ſupport it, prevailed on the Defendant to enter into this engagement. The Defendant's friends diſapproving the connection, it broke off, on which the Plaintiff brought the preſent action.

Lord KENYON left it to the jury, to conſider whether this was not a groſs fraud on the part of the Plaintiff. If they ſhould be of a contrary opinion, and think that the Plaintiff was entitled to recover any thing, they would then take into their conſideration the damages which he had really ſuſtained by the non-performance of the contract, and were not obliged to give the whole ſum for which the bill was given in damages. (*a*)

The jury found for the Defendant.

(*a*) *Vide Barber* v. *Backhouſe and Others, ante* 61.

REX *v.* COLE.

Saturday, July 12th, *At Weſtminſter.*

The informer againſt a perſon guilty of concealing naval ſtores, is a good witneſs to prove the offence, for the court is not obliged to inflict a pecuniary penalty.

THIS was an indictment for concealing naval ſtores.

Erſkine for the Defendant, objected to the competency of one of the witneſſes for the Crown, he being the informer and entitled to a moiety of the penalty of 200*l.* inflicted by the ſtatute of 17 *G.* 2. on perſons guilty of this offence.

Lord

Lord KENYON. I have looked into the Act of Parliament, and think that no objection can be taken on that account, for the Court may order a corporal puniſhment and are not obliged to inflict any pecuniary penalty whatever, (*a*) and *non conſtat*, that they will do ſo. I mention this once for all, that no ſuch objections may in future be taken.

The Defendant was convicted (*b*).

(*a*) *Vide Rex* v. *Bland*, 5 *Term Rep.* 370.

(*b*) *Vide Rex* v. *Blackman*, *Eſpinaſſe* 95.

Tueſday, July 15th. At Weſtminſter.

BOTHAM, Aſſignee, &c. *v.* SWINGLER.

A man who by his own examination on the voir dire, is rendered an incompetent witneſs; may be aſked any queſtion to ſhew his intereſt is at an end, though the act by which his intereſt is deſtroyed is matter of record.

THIS was an action of *aſſumpſit* for goods ſold and delivered by the bankrupt to the Defendant, and for money had and received by him to the uſe of the bankrupt.

The Defendant had been ſervant to *Palmer* the bankrupt, and in that character had received various ſums of money from his debtors.

A man of the name of *Cave* was called to prove the payment of a ſum of money to the Defendant on account of the bankrupt.

On the *voir dire*, he was aſked whether he was not a creditor of the bankrupt; and on his anſwering in the affirmative, *Garrow*, the Defendant's counſel, objected to his evidence.

He was then aſked by the Plaintiff's counſel, (*Erſkine*) whether he had not himſelf become a bankrupt,

bankrupt, and his eſtate been aſſigned under the commiſſion iſſued againſt him.

Garrow objected to this, contending that the proceedings under the commiſſion ſhould be produced.

Lord KENYON. On the *voir dire* he may give any anſwer which ſhews the ſituation in which he ſtands; he is made an incompetent witneſs by his anſwer to the queſtion put by the Defendant's counſel, and it is impoſſible for the Plaintiff to come prepared with the materials neceſſary to ſhew him to be a bankrupt.

He offered to releaſe his allowance to his aſſignees, and the attorney's clerk went out of court to prepare a releaſe; but the other witneſſes not being able to prove the payment of any money to the Defendant, the Plaintiff gave up his cauſe and was nonſuited.

REX *v.* The Inhabitants of the Pariſh of St. PANCRAS.

Thurſday, July 17th. *At Weſtminſter.*

THIS indictment ſtated, that there was on, *&c.* and long before a certain ancient King's highway leading from the city of *London*, to the hamlet of *Highgate*, in the county of *Middleſex*, into and through the ſeveral pariſhes of *St. Mary Iſlington* and *St. Pancras* in the county aforeſaid, for all the King's ſubjects, *&c.* That *a certain part of the ſaid way between* Battle Bridge *and the hamlet of* Highgate *aforeſaid, in a certain lane called or known by the name of* Maiden Lane, *in length three miles and in breadth fifteen feet* lying in the

An indictment againſt a pariſh for not repairing one ſide of the road (the other ſide lying in another pariſh) ought to ſtate that each pariſh was liable to repair *ad medium filum viæ*, and not merely that a certain part of the road *in breadth* 15 *feet* was out of repair.

A record of conviction on an indictment againſt a pariſh for not repairing a road is *concluſive* evidence of the liability of that pariſh to repair.

the pariſh of *St. Pancras*, was ruinous and out of repair, and that the inhabitants of that pariſh ought to repair, *&c.*

Erſkine, in ſtating the proſecutors' caſe, ſaid that all the lands on the *Eaſt* ſide of the lane were in the pariſh of *Iſlington*, and thoſe on the *Weſt* ſide in the pariſh of *St. Pancras*. That the pariſhes parted in the middle of the lane, and of courſe that each pariſh was liable to repair one half of the road.

Lord KENYON on this opening expreſſed a ſtrong opinion that the proſecutors could not ſucceed on this indictment. That it ſhould have particularly pointed out what part of the road laid in one pariſh and what in the other: but on *Wood* (who was alſo counſel for the proſecutors) ſaying, that this was the common mode of drawing theſe indictments, his Lordſhip permitted the cauſe to proceed.

The proſecutors having cloſed their caſe, the Defendants produced a copy of a record of conviction in this Court, on an indictment againſt the inhabitants of the pariſh of *Iſlington*, for not repairing this road called *Maiden Lane*.

Lord KENYON. I am clearly of opinion that this indictment is very inaccurately drawn, it ſhould ſtate that one half of the road lay in the pariſh of *Iſlington*, and the other in the pariſh of *St. Pancras*. But this record is *concluſive* evidence againſt the pariſh of *Iſlington*; for, by it, it is found that they are liable to repair the whole of the road called *Maiden Lane*. I admit that had there been an acquittal, the record could not have been evidence for the pariſh of *Iſlington*. The reaſon why it would not have been evidence for them,

them, is becauſe ſome other parties might have indicted them, and thoſe parties could not be bound by this record. There are many caſes where a record is evidence againſt a perſon, though it is not ſo for him.

If the pariſh of *Iſlington* can ſhew fraud, it will vitiate this or any other tranſaction; but unexplained, this is concluſive evidence. On ſuch a caſe as this the indictment ſhould have ſtated that each pariſh was liable to repair *ad filum medium viæ*.

The Defendants were acquitted without further evidence.

PICKARD *v.* BONNER, Eſq.

Friday, July 18th. *At Guildhall.*

Q. whether a perſon paying money on an illegal conſideration, can recover it back in an action for *money had and received.*

ASSUMPSIT for money had and received.

Mr. *Bonner* the Defendant having a conſiderable place in the Poſt-office, and having occaſion to employ ſeveral perſons as clerks to him; the Plaintiff applied to one *Morris*, who was the Chief Clerk in the Defendant's office, to procure him ſuch a ſituation, and agreed to give him 100*l.* as a conſideration for procuring the place. It was agreed, that the Plaintiff ſhould go into the Defendant's office, and continue there ſix months on trial, that he ſhould have at the rate of 80 *l. per annum*, for that time, and afterwards a further ſalary if the ſervice continued. Afterwards the contract broke off, and it being diſcovered that *Morris* had paid this money over to the Defendant; this action was brought to recover it back.

On

On his examination to-day, *Morris* ſwore that he did not receive this money on account of the Defendant, but entirely on his own account, and that he paid it to the Defendant in part of a debt due from him to the Defendant, of courſe this action could not be ſupported.

But Lord KENYON ſaid that had it been proved that this was a tranſaction between the Plaintiff and the Defendant, the money could not, according to the doctrine which had been laid down by Lord *Mansfield*, be recovered back, for it being for the purchaſe of a place under government would be illegal, and therefore the parties being *in pari delicto*, the Plaintiff could not ſucceed in a court of juſtice (*a*). Lord *Holt* had been of opinion that ſuch an action might be maintained (*b*), and his Lordſhip ſaid, he was inclined to agree with that opinion, though he certainly ſpoke with great diffidence when giving an opinion contrary to that of Lord *Mansfield*, but he thought it would be much more for the benefit of the public, if a perſon who had paid his money under ſuch a contract were permitted to recover it back.

The Plaintiff was nonſuited.

(*a*) *Sed vide Walker* and *Chapman*, cited *Dougl.* 454. in which caſe the Plaintiff was permitted to recover back the money, becauſe the contract remained executory.

(*b*) *Wilkinſon* v. *Kitchin*, 1 *Ld. Raym.* 89.

BRISTOW and Others, Aſſignees &c. v. EASTMAN.

Aſſumpſit for money had and received, lies againſt an infant to recover money embezzled by him. *Comme ſemble.*

THIS was an action for money had and received to the uſe of the bankrupts before they became bankrupts.

The Defendant had been apprentice to the bankrupts, who were merchants, and, during his apprenticeſhip, had been entruſted by them to make entries at the Cuſtom-houſe, and pay other ſums of money on their account. He had frequently charged larger ſums of money than thoſe he actually paid, and the preſent action was brought to recover back the overcharges.

The Defendant attempted to defend himſelf, on account of his being an infant at the time.

Lord KENYON ſaid the queſtion was new, and had not been decided; but he was of opinion that this action, though in *form* ariſing *ex contractu*, in fact aroſe *ex delicto*, and as he could not have defended himſelf by reaſon of his infancy if an action of *trover* had been brought for the money, ſo he ought not to be permitted to defend himſelf on that ground, in this action.

The Plaintiffs proved that the Defendant acknowledged the fraud, and promiſed payment after he came of age, ſo that the point was not determined; the Plaintiffs obtaining a verdict on this evidence.

Saturday, July 19th. At Guildhall.

RICH and Another *v.* TOPPING.

The drawer of a bill of exchange given for an uſurious conſideration, is a good witneſs to prove the uſury in an action againſt the acceptor upon being releaſed by him.

THIS was an action of *aſſumpſit* by the indorſees of a bill of exchange againſt the acceptor.

The Defendant propoſed calling *T. Topping* the drawer and indorſer of the bill, to prove that he had given it to the Plaintiffs on an uſurious conſideration. The acceptor had releaſed him.

Erſkine, for the Plaintiffs, objected that he was not a competent witneſs, although releaſed by the acceptor. He admitted he would be a good witneſs to prove it void, *as againſt the acceptor*, on account of the want of conſideration *&c.* being known to the Plaintiffs, but he could not be a witneſs to prove uſury, which would entirely defeat the bill, and diſcharge himſelf as well as the acceptor. If an action for uſury were brought, he could not be a witneſs.

Lord KENYON. I ſhould have been of opinion there was ground ſufficient to reject his teſtimony, if he had not been releaſed by the acceptor, becauſe he would have been liable to him; but after a releaſe the acceptor could not call upon him. I will not anticipate whether he would be a witneſs in an action for uſury. But the judgment in this cauſe could not be evidence either for or againſt him, in another action. It would not go one ſtep towards proving uſury.

The Defendant, by the evidence of *Thomas Topping* and other witneſſes, made a ſtrong caſe, and Lord *Kenyon*'s direction was in his favour, but the Jury found for the Plaintiffs.

SMITH and Others *v.* CLARKE.

Monday, July 21ſt.

When the payee of a bill of exchange has made an indorſement *in blank* thereon, no ſubſequent indorſee can reſtrain its negotiability by a *ſpecial* indorſement.

THIS action was brought by the Plaintiffs as indorſees of a bill of exchange againſt the acceptor.

The bill was indorſed *in blank* by the *payee*, and, after ſeveral indorſements, it came to one *Jackſon* (whoſe aſſignees had indemnified the preſent Defendant) under a *ſpecial* indorſement to him or order. *Jackſon* ſent it to *Muir* and *Atkinſon*, and they diſcounted it with the Plaintiffs, but *Jackſon* had not indorſed it. The Plaintiffs had ſtruck out all the indorſements except the firſt.

Law, for the Defendant, objected that this ſpecial indorſement had reſtrained the negotiability of the bill, and that the Plaintiffs could not recover without an indorſement by *Jackſon*.

Lord KENYON. The fair holder of a bill may conſider himſelf as the indorſee of the payee, and ſtrike out all the other indorſements. This ſpecial indorſement being made after the payee had indorſed it, cannot affect the title of the preſent Plaintiffs.

Note. The Plaintiffs afterwards proved a letter from *Jackſon* to *Muir* and *Atkinſon*, deſiring them to diſcount this and other bills, but Lord *Kenyon* thought the Plaintiffs' caſe ſufficiently made out without this evidence.

Verdict for the Plaintiffs (*a*).

(*a*) *Vide Edie* v. *Eaſt-India Company*, 2 *Burr.* 1216. *Peacock* v. *Rhodes* and Another, *Dougl.* 611. *Ancher* v. *Governor and Co. of the Bank of England*, *ib.* 615.

Wednesday, July 23d.

SCOTT and Another v. LARA.

To support an action for a false assertion as to the circumstances of a third person, it must appear that the Defendant intended to impose on the Plaintiff, and that the Plaintiff relied on his information.

THE declaration stated that one *David Valentine* having applied to the Plaintiffs to purchase goods on credit, and the Plaintiffs being unacquainted with the credit of *Valentine*, and not knowing whether he was a person safely to be trusted, refused to sell him the goods until they should have made enquiry about his circumstances and credit. Whereupon *Valentine* referred the Plaintiffs to the Defendant *Moses Lara*, as a person well acquainted with his circumstances and credit. That thereupon the Defendant was requested by one *Moses Lindo*, the Plaintiffs' agent in that behalf, to inform them of the credit and circumstances of *Valentine*, when the Defendant wrongfully &c. *intending to defraud the Plaintiffs, and to induce them to* sell the goods to the said *Valentine* affirmed and asserted to said *Moses Lindo*, that *Valentine* was a safe man, in good circumstances, and might be safely trusted. Whereas in truth and in fact the Defendant knew him to be the reverse *&c.* That Plaintiffs thereupon sold the goods to *Valentine* on credit, whereby they lost the value thereof *&c.*

Moses Lindo swore that he was desired by the Plaintiffs to enquire *Valentine*'s character and circumstances of the *Laras* (there being two brothers in partnership); that he enquired of *Benjamin Lara*, the Defendant's brother, as to his credit, and whether he might be trusted; *B. Lara* answered in the affirmative, and said that he and his brother *Moses* were to enter into partnership with *Valentine* on the *first of June* then next, and that he had inspected his books. *Lindo* afterwards

terwards ſaw the Defendant, and told him the converſation which had paſſed between himſelf and *B. Lara*. The Defendant confirmed the character of *Valentine* given by his brother, and ſaid he might be ſafely truſted. *Lindo* did not mention to the Defendant that he was deſired by the Plaintiffs to apply to him, nor did he communicate to the Plaintiffs the converſation he had with *the Defendant*, but only mentioned the information he had received from *B. Lara*.

Lord KENYON. The Plaintiff cannot, on this evidence, recover againſt the preſent Defendant, though he might poſſibly againſt *Benjamin Lara*. There are two important links in the chain, wanting to bring it home to the Defendant. *Lindo* did not communicate to him on whoſe account he applied, or to the Plaintiffs the information which the Defendant had given. Both the circumſtances are neceſſary to ſuſtain the action, for it muſt appear that the lie was told *for the purpoſe of impoſing on the Plaintiffs*, and that they relying on that information were deceived.

The Plaintiff were nonſuited (*a*).

(*a*) *Vide Paſley* and Another v. *Freeman*, 3 *T. Rep.* 51.

KINGSTON *v.* PHELPS.

ASSUMPSIT on a policy of inſurance.

A ſubmiſſion to arbitration may be given in evidence on a count on the original promiſe.

The Plaintiff called a witneſs to prove that when the other underwriters referred the cauſes commenced againſt them, on this policy, to arbitration, the Defendant conſented to be bound by the award, and that the arbitrators had decided in favour of the Plaintiff.

Law, for the Defendant, objected to this evidence being received on this declaration, and contended, that to have the benefit of it, the Plaintiff ſhould have had a count on the award.

Lord KENYON. This is a good evidence on this declaration, on the ſame principle as admiſſions are daily given in evidence.

The witneſs not proving any agreement on the part of the Plaintiff to be bound by the award, his Lordſhip ſaid there was no mutuality, and therefore the Defendant's agreement was a mere *nudum pactum*, and not binding upon him.

The Plaintiff then called witneſſes to prove the loſs, and on their evidence obtained a verdict.

CASES IN *K. B.*

AT THE SITTINGS

AT NISI PRIUS,

AFTER MICHAELMAS TERM

35 GEORGE III. 1794.

FORD *v.* FOTHERGILL.

Saturday, November 29th. *At Weſtminſter.*

It is incumbent on a tradeſman before he truſts an infant with what may appear neceſſaries, to enquir whether he is provided by his friends.

ASSUMPSIT for work and labour as a taylor. The Defendant pleaded that at the time of making the promiſes he was an infant; and the Plaintiff replied that the cloaths furniſhed were neceſſary for him.

The caſe appeared to be ſhortly this. The Defendant, being under age, came to the houſe of the Plaintiff, in company with a gentleman who was previouſly a cuſtomer of his, and ordered a coat, waiſtcoat and two pair of breeches, which were to be ſent to the *Grecian Coffee-houſe*, and were accordingly ſent there.

The Defendant proved that at this time he was provided by his father with all things neceſſary for his ſupport. He had been very extravagant, and his father had, in the courſe of the year 1793, when this debt was contracted, paid many other debts contracted with other *taylors* to a large amount.

Mingay, for the Plaintiff, contended that it was not incumbent on the Plaintiff to traverſe the town to enquire the Defendant's fortune and character. He came to him as a man of fortune and figure, introduced and recommended by a gentleman of fortune, If *the Plaintiff thought* them neceſſary for his ſtate and degree, that would maintain the iſſue. In the way he appeared to the Plaintiff he could not know but that he had an eſtate of 500 *l. per annum*.

Lord KENYON (after lamenting the profligacy and extravagance of the youth of the preſent day, and the encouragement they received from perſons truſting them with things for which they had no occaſion) ſaid, that from the earlieſt ages and in all countries, the law had protected men at the time of life when they had not wiſdom to protect themſelves. Nothing is clearer in the law than that an infant cannot contract a debt except for neceſſaries. It is abſolutely neceſſary that he ſhould have the power of making that contract, otherwiſe he would ſtarve. As to the Plaintiff not knowing his fortune it is no excuſe, it was incumbent on him to enquire into that, and to prove it to the Jury. Whether he was living with his father or not, the perſon who dealt with him was bound to enquire and know who he was. He was living at a coffee-houſe, itſelf no mark of a wary diſpoſition, the Plaintiff ſhould have enquired there, and gone to his father and enquired of him whether he was in want of theſe cloaths. Circumſtanced as this caſe is, ſuch an enquiry ought to have been made (*a*).

(*a*) *Vide Lainbridge* v. *Pickering*, 2 *Blac.* 1325.

Notwith-

Notwithſtanding this direction, the Jury found a verdict for the Plaintiff.

Bearcroft for the Defendant.

REED *v.* PASSER and Others.

Tueſday, December 2d. *At Weſtminſter.*

The Fleet books are no evidence.

SEVERAL iſſues were directed by the Court of Chancery to be tried between theſe parties; but the firſt and only iſſue which was conteſted between them was, whether the Plaintiff was the heir at law of *Ann Botham* deceaſed.

The Plaintiff and *Ann Botham* were brother and ſiſter, but it was contended by the Defendants, that their father and mother were never married, and therefore that they were both illegitimate.

Garrow, in opening the Plaintiff's caſe, ſaid that he ſhould prove by the friends and relations of this father and mother, that they were generally looked upon in the family as man and wife, and viſited and treated as ſuch. In addition to this, he ſaid, he ſhould produce one of the Fleet regiſters, which contained an entry in *March* 1753 of a marriage being celebrated between them.

Lord KENYON. I muſt be conſiſtent with myſelf; I did hold, on the laſt Home circuit, that theſe books were no evidence whatever. Mr. J. *Heath*, I am told, afterwards ruled otherwiſe at *Shrewſbury* (*a*), but I cannot depart from my opinion. I have ſince looked into the books, and find my opinion ſtrongly

(*a*) *Doe dem. Paſſingham* v. *Lloyd*, *Shrewſb. Summer Aſſizes*, 1794.

fortified by authorities. There is a caſe of *Morris* and *Miller* (*a*) in Sir *James Burrows'* Reports which is in favour of the opinion I have given; there it was taken for granted that ſuch books could not in any caſe be received as evidence. This is my opinion; it muſt guide *my* conduct. If others differ from me, it is very fit that my opinion ſhould be conſidered.

But the general reputation of the family that the parties were married *in the Fleet*, is good evidence.

When a witneſs was called to prove the general reputation that they were man and wife, *Mingay*, for the Defendants, aſked him whether the parties did not ſay they were married in the Fleet; and upon the witneſs anſwering in the affirmative, objected to the teſtimony, contending that as the Fleet books were themſelves no evidence of a marriage, any reputation of a marriage *there* was alſo inadmiſſible.

Lord KENYON. The books cannot be received, becauſe they come from tainted quarters, but the declaration of the parties that they were married there is good and ſtrong evidence. A marriage in the Fleet at that time was good and legal. I think, though I do not ſpeak meaning to be bound, that even an agreement between the parties *per verba de præſenti*, was *ipſum matrimonium* (*b*).

The Plaintiff having made a ſtrong caſe by this kind of evidence, and no anſwer being given to it by the Defendants,

The regiſtration of a marriage is not abſolutely neceſſary to make it valid.

Lord KENYON ſaid, that even ſince the marriage act it was not eſſential to the legality of the marriage

(*a*) 4 *Burr.* 2057.

(*b*) *Vide Holt* v. *Ward Clarencieux*, 2 *Stra.* 937 & 8. *Swinb.* 74. 2 *Salk.* 438. 6 *Mod.* 155.

that

that there ſhould be a regiſtration, but the act of parliament making it criminal in the clergyman not to do it, it is generally done. But ſtill a marriage, ſince that act might be proved by reputation as well as one before.

The Jury found for the Plaintiff (*a*).

(*a*) *Vide Standen* v. *Standen, ante* 32. and *Lawrence* and Others v. *Dixon, ante* 136.

JONES *v.* BROWN and Another.

Thurſday, December 4th.

TRESPASS for an aſſault on *Joſhua Brown*, the Plaintiff's ſon and ſervant, *per quod ſervitium amiſit.*

To maintain an action for aſſaulting Plaintiff's infant ſon *per quod &c.* proof of his living under his father's roof, is ſufficient evidence of ſervice.

The aſſault being proved, the Plaintiff's counſel proceeded to prove that *Joſhua Brown* (who was a lad about 14 or 15 years of age), was employed about his father's buſineſs.

Lord KENYON ſaid ſuch evidence was unneceſſary. If he lived in his father's family, and under his protection, that was ſufficient to maintain the action.

Verdict for the Plaintiff (*a*).

(*a*) *Vide Fores* v. *Wilſon, ante* 55. accord.

DICKENSON *v.* BROWN and Others.

Friday, Dec. 5th.

A juſtice's warrant continues in force until fully executed. If the putative father of a baſtard child agrees to indemnify the pariſh, they may demand any ſecurity they think proper.

TRESPASS for breaking and entering the Plaintiff's houſe, and impriſoning him. The Defendant juſtified the treſpaſs, under a juſtice of peace's warrant to apprehend the Plaintiff as the putative father of a baſtard child, in order to indemnify the pariſh or enter into a recognizance for his appearance at the ſeſſions.

To this plea the Plaintiff made a new aſſignment, ſtating that after the Plaintiff had been apprehended, and executed a bond to indemnify the pariſh, and at a different time from that ſtated in the plea, *&c.* the Defendants committed the treſpaſſes complained of.

It appeared that on the 2d of *October*, 1793, the Plaintiff was apprehended under the warrant, and then went to the veſtry, where he agreed to enter into a bond with two ſureties to indemnify the pariſh. He and *one* of the ſureties then executed the bond, but the other ſurety did not. On the 17th of *January*, 1794, the Plaintiff was again apprehended, by the direction of the pariſh officers, in order to compel him to procure another ſurety. No freſh warrant had been obtained.

Mingay & *'Eſpinaſſe* for the Plaintiff, contended that the ſecond arreſt was illegal and could not be juſtified, that when the Plaintiff had been once apprehended, the warrant was executed, and that, ſuppoſing the pariſh were not ſufficiently indemnified, yet before he could be apprehended a ſecond time, a new warrant ſhould have been obtained for that purpoſe.

Lord KENYON ſaid, that the warrant of a magiſtrate was not returnable at any particular time, but continued in force until it was fully executed and obeyed,

though it were ſeven years, provided the magiſtrate ſo long lived. That the warrant was not in this caſe fully executed, the pariſh officers had a right to have any ſecurity they required, however large, if the buſineſs was ſettled in that way. This was no hardſhip on the Plaintiff, for he was not obliged to enter into any ſuch ſecurity, but might enter in a recognizance to appear at the ſeſſions, and abide ſuch order as they ſhould make. (*a*)

Verdict for the Defendants.

(*a*) *Vide Stat.* 6 *Geo.* 2. *c.* 31, and 1 *Burn's Juſt.* 185.

SNELL *v.* RICE.

ASSUMPSIT for work and labour.

If a Defendant be let in to plead on the terms of not availing herſelf of her coverture, ſhe cannot ſhew that the Plaintiff truſted her huſband and not her.

The Defendant was a married woman, and the Plaintiff having obtained a regular judgment, the Court ſet it aſide, and let the Defendant in to plead, ſhe undertaking not to plead or take advantage of her coverture.

Mingay for the Defendant, offered to prove that the Plaintiff knew the Defendant's huſband, and did this work on his credit. He contended, that this was evidence in this caſe, on the ſame principle that evidence was daily admitted, to prove that the work was done on the credit of a third perſon and not of the Defendant; and it was not to be conſidered as availing herſelf of her coverture.

But Lord KENYON thought this inadmiſſible evidence. The true conſtruction of the rule is, that the Defendant ſhould only diſpute the *quantum* or juſtice of the debt: and not be permitted *in any way* to ſhew that her huſband was liable, and ſo turn the Plaintiff round.

Verdict for the Plaintiff.

Saturday, December 6th.

REX *v.* The Earl of ABINGDON.

The privilege of replying in a criminal proſecution, when the Defendant does not call witneſſes, is confined to the Attorney General. *Comme ſemble.*

THIS was an information againſt the Defendant for a libel on Mr. *Thomas Sermon* an Attorney.

The Defendant having ſpoken in his defence, but not called any witneſſes, *Erſkine* for the proſecution claimed the privilege of a reply, contending, that the counſel for the Crown had always this privilege; and *Garrow*, who was on the ſame ſide, ſaid it had frequently been exerciſed.

Gibbs, as *amicus curiæ* ſaid, he had known ſeveral inſtances in which this privilege had been exerciſed on the circuit; and *Mingay*, who was alſo out of the cauſe, ſaid he always underſtood that every counſel for the Crown, had the privilege, though it was rarely claimed.

But Lord *Kenyon* ſaid, that though the Attorney General had undoubtedly this privilege, yet he never knew any other counſel for the Crown claim it, and he would not make the precedent in this cauſe.

The Defendant was convicted.

Monday, December 8th. At Weſtminſter.

An averment that the Defendant is an Attorney of a particular Court is not proved by the production of his bill of fees for buſineſs done in that Court.

GREEN *v.* JACKSON.

THIS was an action of *aſſumpſit* againſt the Defendant, for negligence and miſconduct as an Attorney. The declaration ſtated, that *John Pott* being indebted to the Plaintiff, *&c.* ſhe applied to the Defendant (he the ſaid *Nathan* being then and there one

one of the Attornies of the Court of Seſſion of the county of *Cheſter*), and then and there retained and employed him, *&c.*

The Plaintiff had, on the third inſtant, given the Defendant notice to produce his admiſſion as an Attorney of the Court of *Cheſter*; and it not being produced, her counſel offered his bill for buſineſs done in that Court, as ſufficient evidence to prove the averment.

Bower for the Defendant, objected that this was no evidence of the Defendant being an Attorney of the Court of Seſſion.

Garrow for the Plaintiff anſwered, that having acted as an Attorney in that Court, he could not now ſay that he was not ſo: and *Wood*, who was on the ſame ſide, ſaid a caſe had lately come before the Court, where in an action by an Attorney for words ſpoken of him in his profeſſion, it was held that he was not obliged to prove his admiſſion (*a*).

Lord KENYON ſaid, that by this declaration the Plaintiff had encumbered herſelf with too much proof. If ſhe had ſtated him generally to have been employed as an Attorney, the evidence would have been ſufficient. But his bill does not prove him to be an Attorney of that Court. As an Attorney of this or any other Court in *Weſtminſter Hall*, he had a right to practice in that Court, uſing the name of an Attorney there.

His Lordſhip was about to direct a nonſuit when a juror was withdrawn by the conſent of the parties.

(*a*) *Vide Berryman* v. *Wiſe*, 4 *Term Rep.* 366.

Wednesday, December 10th, At Guildhall.

BOURDILLON *v.* DALTON and Others.

Assignees of a bankrupt are not liable to be charged for rent of premisses assigned to them unless they take possession.

COVENANT against the Defendants as assignees for rent.

The lease had come by several mesne assignments to *Thomas Bell*, who had become a bankrupt, and his estate was assigned to the Defendants by the commissioners.

The Defendants had never taken possession of the premisses.

Lord KENYON. They cannot be charged as assignees of the estate of *Bell*, unless they have taken possession of the premisses. This resembles what is called the *damnosa hæreditas* in another law (*a*). If the assignee takes possession of it, he must take it with all its charges; but if he chuses to abandon it, it cannot be forced upon him.

The Plaintiff was nonsuited (*b*).

(*a*) *Vide Domat's Civil Law, B.* 1. *Tit.* 1. *s.* 3. and *note* c.

(*b*) *Vide Eaton* v. *Jaques, Dougl.* 438. *Walker* v. *Reeves, ibid.* 444. *Note* 1.

Thursday, December 11th.

BUTLER *v.* RHODES.

If a creditor looks over a deed of composition proposed by his debtor, and sends a letter to the debtor's attorney expressing his approbation of it, and other creditors afterwards execute the deed, he cannot afterwards refuse to execute and maintain an action.

ASSUMPSIT for goods sold and delivered.

The Defendant had executed a deed, whereby he assigned all his property to trustees for the benefit

of

of his creditors, and they agreed to accept a compoſition on their reſpective debts.

Several creditors had executed the deed, and before ſome of them had done ſo, the Plaintiff had alſo agreed to accept the compoſition, and the deed had been peruſed by his attorney, who had ſent a letter to the Defendant's Attorney, expreſſing his client's approbation of it. The Defendant's counſel contended, that under theſe circumſtances the Plaintiff could not recover.

Garrow and Park for the Plaintiff, objected that none of the caſes which had been decided went ſo far as to determine that in a caſe like the preſent, the Plaintiff could not withdraw himſelf from the compoſition. Here the Plaintiff had never in fact executed the deed, nor did it even appear that this letter of the Attorney had been ſhewn to any other creditor to induce him to execute the deed.

Lord KENYON was of opinion, that the other creditors muſt have been induced to enter into this agreement on the faith of the Plaintiff alſo being a party to it. The tranſaction ſpeaks for itſelf. Beſides, the Defendant himſelf had been induced to commit an act of bankruptcy, by aſſigning all his effects.

The Plaintiff was nonſuited. (*a*)

(*a*) *Vide Heathcote and Others* v. *Cruikſhanks*, 2 *Term Rep.* 24. *Cockſhott* v. *Bennett*, *ibid.* 763. *Jackſon* v. *Duchaire*, 3 *Term Rep.* 551. *Jackſon* v. *Lomas*, 4 *Term Rep.* 166.

REDDIE *v.* SCOOLT, Clerk.

A father who has permitted a married man to viſit his daughter as a ſuitor, cannot maintain an action againſt him for ſeducing her.

TRESPASS for aſſaulting and debauching *Helen Reddie* the Plaintiff's daughter and ſervant *per quod ſervitium amiſit.*

It appeared, that the Defendant came frequently to the Plaintiff's houſe, and was received and entertained as a ſuitor of the daughter. During the time this intimacy continued, the father received an anonymous letter informing him that the Defendant was *a married man,* and a great libertine, and cautioning him againſt permitting him to be too familiarly acquainted with his daughter. The Plaintiff mentioned this letter to the Defendant, when he confeſſed he had a wife ſtill living, but repreſented her as a woman of ſo abandoned a character, that he could not live with her. He told the Plaintiff that they had been parted ſix years, and at the end of the ſeventh, he ſhould be able to obtain a divorce, and would then marry his daughter. He added, that his wife was worn out with diſeaſe and could not long live. It alſo appeared, that the Plaintiff had been warned by another perſon to break off his acquaintance with the Defendant, notwithſtanding which he permitted him to continue his viſits and go *alone* with his daughter to the Theatre; the conſequence of which was the accident which gave riſe to the preſent action.

Lord KENYON ſaid, that however reprehenſible the conduct of the Defendant might be, and the unfortunate girl ſeduced, entitled to pity, ſtill it muſt be recollected that the father was the Plaintiff on this record, and if *he* had miſconducted himſelf, this action could

could not be maintained. His Lordſhip thought that the Plaintiff had been guilty of groſs miſconduct, in ſuffering the Defendant to continue his viſits, after he knew that he was a *married man*, and had received a caution againſt admitting him into his family. He therefore found himſelf obliged to call the Plaintiff, though the conduct of the Defendant was ſo groſs that he would certainly repreſent him to the Biſhop.

The Plaintiff was nonſuited. (*a*)

(*a*) *Vide Hodges* v. *Windham*, *ante* 39.

LEWIN and Others *v.* The EAST INDIA Company.

Saturday, Decem. 13th.

If a ſhip be chartered to the *Eaſt India* Company for the purpoſe of *trade or warfare*, and they order her on a voyage of *diſcovery*, againſt the conſent of the owners whereby the ſhip is loſt, the owners may maintain an action on the caſe. *Aliter*, if the owners conſent to the voyage.

THIS was a ſpecial action on the caſe. The declaration ſtated, that the Plaintiffs being owners of a ſhip called the *Vanſittart*, by a charter-party of affreightment, dated 13th of *Auguſt*, 1788, let the ſame to the Defendants to freight for a certain voyage with her to be made *in trade and alſo in warfare*, as the ſaid company, or any their governors, *&c.* ſhould require or direct. That the Plaintiffs thereby covenanted, that the ſhip ſhould be uſed by the company *in trade or warfare*, if required by the company, *that the maſter ſhould obſerve the orders of the company*, and that they ſhould have power to diſplace him or any other officer or officers belonging to the ſhip. The declaration then ſtated, that the ſhip ſailed on her voyage, and was engaged in the ſervice of the Defendants; and that they, *without the knowledge or conſent, and againſt the will* of the Plaintiffs

employed the ſaid ſhip in and upon a certain voyage and ſervice, not being a voyage and ſervice of trade or of warfare, and not being a voyage or ſervice mentioned in, or intended to be warranted by the charter party, or upon which the ſaid ſhip ought to have been employed; to wit, in and upon a certain voyage and ſervice of obſervation and diſcovery, in and to a certain dangerous ſea ſtraight or paſſage ſituate to the *Eaſtward* of a certain iſland called the iſland of *Banca*, for the purpoſe of exploring the ſaid ſea, ſtraight or paſſage: and wrongfully, *&c.* without the knowledge, *&c.* kept and detained the ſaid ſhip in the ſaid voyage of obſervation and diſcovery for a great length of time; by reaſon whereof the ſhip, in the courſe of the ſaid voyage, *&c.* was ſtranded, ſunk, and wholly loſt.

The Plaintiffs proved that the *Eaſt India Company* wiſhing to eſtabliſh a paſſage by the Straights *Eaſtward* of the iſland of *Banca*, inſtead of the uſual paſſage through the Straights of *Banca*, had given Captain *Wilſon*, who had the command of the *Vanſittart*, orders to take his paſſage to *China* that way, and to explore the coaſt as he paſt. That in obedience to thoſe orders, the Captain ſailed on that voyage, and in the courſe of it the ſhip ſtruck on a coral rock and was loſt. On his croſs examination, Captain *Wilſon* ſaid, that Mr. *Lewin*, the ſhip's huſband, had retired from the cares of buſineſs, and that his ſon, who was alſo a Plaintiff in this cauſe, tranſacted his buſineſs. That he had received his orders from the Company before he left *England*, and had communicated them to Mr. *Lewin* the ſon, who did not object to the voyage.

Lord

Lord KENYON. The Captain was bound to obey the orders given him by the Company. Theſe orders were certainly not warranted by the terms of the charter-party, and therefore had the caſe reſted on the orders, I ſhould have thought that the Plaintiffs had a right to maintain the preſent action. But the conſent of Mr. *Lewin*, junior, who was agent of the ſhip's huſband, entirely alters the caſe, for the ſhip proceeding from *England* without any objection from him, it muſt be taken that ſhe ſailed with his conſent, and therefore proceeded at the riſk of the owners. His Lordſhip added, that had there been any colluſion between the company and one part owner, that would not have bound the others; but nothing of that kind appeared to have been intended in the preſent caſe.

The Plaintiffs were nonſuited.

Erſkine, *Bower* and *Gibbs* for the Plaintiffs.

Bearcroft and *Rous* for the Defendants.

ERRATA ET ADDENDA.

Page 6. Note (*a*) for 236 read [236]
12. in margin, for *July* 13*th*, read *July* 3*d*.
18. in margin, for *Decem.* 9*th*, read *Decem.* 10*th*.
20. in margin, for *Decem.* 11*th*, read *Decem.* 12*th*.
24 line 19 and 20, for 20th 25 *l.* read 20th and 25 *l.* and line 20, for 40*l.* read 60 *l.*
45. l. 5 and 23. p. 50. l. 19, and p. 51. l. 7. for *Defendant* read *Plaintiff*.
65. *Kempland* v. *Macauley* add *and Another*.
68. *Williams* v. *Dyde & al'*, *paſſim*, for *Defendant* read *Defendants*, and alter accordingly.
75. in margin, for *Tueſday* read *Thurſday*.
77. *Du Barre* v. *Livette*, read *Du Barré*, &c.
81. At the end of the caſe *Baker & al'* v. *Charlton*, add *Verdict for Plaintiffs*.
96. l. 24. for *would* read *could*.
97. l. 16. for *that* read *the*, l. 17, for *the* read *they*.
109. l. 5. for *Holdworth* read *Holdſworth*.—laſt line but one after *annuity* add *ceaſed*.
135 for *ro* read *or*.

Since the firſt ſheet of this work was printed off, Mr. *Butler* has publiſhed his additional notes on *Co. Lit.* The caſe of *Roe dem. Brown* v. *Wilkinſon*, 270. b. n. 1. recognizes the doctrine that notices to quit may be governed by the cuſtom of the country, the reader is requeſted to add a reference to that caſe, to the note (*a*) at the end of the caſe *Roe dem. Henderſon* v. *Charnock*, p. 5. And alſo to put a note of reference to the caſe of *Gutteridge* v. *Smith*, 2 *Hen. Black.* 374, at the end of the caſe of *Middleton* v. *Brewer*, p. 15.

A

TABLE

OF THE

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A.

ACTION,

See AUCTIONEER. ASSUMPSIT, &c. DECEIT. MAIL COACH. PILOT. WITNESS, No. 17.

1. THE Plaintiff may ſhew that a penal action was commenced within a year, as well after as *before* the objection, that it does not appear on the record is made. *Maugham qui tam v. Walker.* *Page* 163
2. The proprietor of a public amuſement cannot maintain an action for a libel on one of his performers, by reaſon whereof ſhe was deterred from appearing on the ſtage. *Aſhley v. Harriſon.* 194
3. An action lies againſt the maſter of a veſſel for purpoſely firing a cannon at negroes, and thereby preventing them from trading with the Plaintiff. *Tarleton v. M'Gawley.* 205
4. And it is no defence to ſuch action that the Plaintiff had not conformed to the law of the country in paying the duty due to the King for his licence to trade. *Page* 205
5. If a ſhip be chartered to the Eaſt India Company for the purpoſe of *trade or warfare*, and they order her on a voyage of *diſcovery* againſt the conſent of the owners, whereby the ſhip is loſt, the owners may maintain an action on the caſe. *Lewin v. Eaſt India Company.* 241
6. *Aliter*, if the owners conſent to the voyage. *ib.*

ADMISSION,

See CONFIDENCE. EVIDENCE, No. 1, 2, 3. 29, 30.

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1. When an annuity is reſcinded after it has been paid ſome time, the purchaſer is is entitled to recover back his *whole* purchaſe money. *Beachamp* v. *Borret.* *Page* 109

APPRENTICE,

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1. A man who has been engaged as chief clerk and manager of a manufacture for 7 years, has ſerved a ſufficient apprenticeſhip within the ſtat. 5. *Eliz.* though he was never engaged in the *manual* labour of the buſineſs. *Smith* v. *Armourers* and *Braziers Company.* 148

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ASSETS.

1. Money received by an adminiſtratrix for the good will of a public houſe, is aſſets in her hands *Worral* v. *Hand.* 74

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See USE and OCCUPATION, *&c.*

1. A Plea of a tender to declaration on a promiſe to pay the debt of a third perſon, precludes the neceſſity of proving ſuch promiſe to be in writing. *Middleton* v. *Brewer.* *Page* 15

2. In an action of *aſſumpſit* on an expreſs promiſe to pay for the maintenance of a baſtard child, of which the Defendant was the putative father, it is no defence that he has ſince diſcovered that the child was not begotten by him. *Shaw* v. *Whiteman.* 29

3. In *aſſumpſit* for *money had and received*, to recover back money paid to the Defendant, it is not neceſſary to ſhew that *he knew* he was not entitled to receive it. *Robinſon* v. *Anderton.* 94

4. For *money paid laid out and expended*, lies at the ſuit of a ſheriff's officer who has diſcharged the Defendant on payment of the ſum indorſed on the writ, and has been obliged to pay the reſt of the debt. *Cordron* v. Lord *Maſſarene.* 143

5. But not at the ſuit of a gaoler who has been obliged to pay money in conſequence of a *voluntary* eſcape, though ſuch eſcape was permitted through ignorance of the law. *Eyles* v. *Faikney.* *n.* 144

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1. An

A TABLE OF THE PRINCIPAL MATTERS.

1. An *agent* to a *country attorney*, is not obliged to deliver a bill ſigned previous to the commencement of an action for his fees. *Bridges* v. *Francis* 1. *Jones* v. *Price* n. *P.* 2
2. But an *Attorney* cannot maintain an action againſt his *Client*, even for the money expended by him in a cauſe without delivering a bill ſigned. *Miller one, &c.* v. *Towers.* 102
3. In an action againſt an attorney for ſuffering a debtor of the Plaintiff to be ſuperſeded, proof that ſuch debtor was a married woman, deſtroys the action, when the declaration ſtates that ſhe was indebted. *Lee* v. *Ayrton one &c.* 119
4. Q. Whether the declaration would be good without ſtating that the original Defendant was indebted to the Plaintiff. *ib.*
5. Where a declaration ſtates that the Defendant was an attorney of the Court of Seſſion, the production of his bill for buſineſs done in that Court is not ſufficient proof of the averment. *Green* v. *Jackſon.* 237
6. If a bill filed againſt an attorney in vacation be entitled of the preceding term, and the Defendant plead the ſtat. of Limitations, he may ſhew when the bill was in fact filed. *Snell* v. *Phillips.* 209

AUCTIONEER.

1. Where an auctioneer does not name his principal at the time of the ſale, he is perſonally liable to an action for damages for not compleating the contract. *Hanſon* v. *Roberdeau.* 120
2. If one of the conditions of ſale is that a certain ſum *per cent.* ſhall be paid as a depoſit, and the auctioneer accepts a leſs ſum, he cannot afterwards object that too little was paid. *Page* 120

B.

BAIL.

1. Bail above, put in by the ſheriff (who diſcharged the Defendant without a bail bond) may ſurrender the Defendant. *Rex* v. *Butcher.* 169

BANKRUPT,

See EVIDENCE, No. 30. PLEADING, No. 10. WITNESS, No. 1. 12.

1. Though a trader deny himſelf for the expreſs purpoſe of becoming a bankrupt, ſuch denial will ſupport a commiſſion taken out by a petitioning creditor who was not privy to it. *Roberts* v. *Teaſdale.* 27
2. If a trader deliver over a bill of exchange to another for a valuable conſideration, and forget to indorſe it, he may indorſe it after he has become a bankrupt. *Smith* v. *Pickering.* 50
3. And in ſuch caſe the evidence of one partner that his partner had told him *at the time*, that he had paid the bill away is admiſſible. *ib.*
4. Where a trader buys goods on credit and commits an act of bankruptcy, the creditor may take out a commiſſion before the day of payment

although no *written ſecurity* is given for the debt. *Comme ſemble.* *Henbeſt* v. *Brown.* *Page* 54

5. To ſupport a commiſſion of bankrupt it is neceſſary that the petitioning creditor's debt ſhould be *contracted* before the bankrupt ceaſes to be a trader. *Dawe* v. *Holdſworth.* 64

6. But if the debt be contracted whilſt he is in trade, and a bond is given for it afterwards, it is ſufficient. *ib.*

7. If *A.* be indebted to *B.* in 100*l.* and then leaves off trade, and afterwards contracts a further debt, but pays more than 100*l.* without applying it to any particular account; it muſt be placed to pay off the old debt firſt, and *B.* cannot afterwards be a petitioning creditor. *ib.*

8. A ſchoolmaſter buying books and ſhoes and ſelling them to his ſcholars at an advanced price, is not a trader within the bankrupt laws. *Valentine* v. *Vaughan.* 76

9. If *A.* fraudulently procures a bill of exchange from *B.* and afterwards becomes bankrupt, and his aſſignees receive money for the bill; *B.* may recover it from them in an action for money had and received. *Harriſon* v. *Walker.* 111

10. If an uncertificated bankrupt carry on trade and ſell goods to *A.* no one can diſpute his title but the aſſignees. *Laroche* v. *Wakeman.* 140

11. Aſſignees of a bankrupt are not liable for the rent of premiſſes aſſigned to them by the commiſſioners unleſs they take poſſeſſion. *Bourdillon* v. *Dalton.* 239

12. When an aſſignee is removed and aſſigns his intereſt to the other aſſignees, they may maintain an action againſt him for money had and received to recover the money received by him as aſſignee. *Smith* v. *Jameſon.* *Page* 213

BANK STOCK,

See EVIDENCE, No. 11, 12.

BARON AND FEME,

See CRIM. CON. WITNESS, No. 9, 10.

1. No action lies for harbouring the Plaintiff's wife when ſhe is kept by the Defendant from a principle of humanity to protect her from the ill treatment of her huſband. *Philp* v. *Squire.* 82

BARRISTER.

1. No action lies againſt him for miſconduct. *Fell* v. *Brown.* 96

2. Or to recover back the fee given him. *Turner* v. *Philipps.* 122

BASTARD,

See ASSUMPSIT, No. 2. FALSE IMPRISONMENT, No. 2.

1. If the putative father of a baſtard child agrees to indemnify the pariſh, they may demand any ſecurity they think proper. *Dickenſon* v. *Brown.* 234

BILL OF EXCHANGE,

See BANKRUPT, No. 2, 3. FORGERY, No. 1, 3, 4. PROMISSORY NOTE, WITNESS, No. 2, 3, 4, 5, 6. 27.

A TABLE OF THE PRINCIPAL MATTERS.

1. A general receipt on the back of a bill of exchange is *prima facie* evidence of its having been paid by the *acceptor*, and will not of itſelf be evidence of a payment by the drawer though produced by him. *Scholey* v. *Walſby*. *Page* 25
2. If there is no conſideration for part of a ſum contained in a bill of exchange, the jury may give damages for ſo much as there is a good conſideration for. *Barber* v. *Backhouſe* 61
3. So if it is given as a ſecurity for the performance of an agreement, the jury, in an action on the bill may give ſo much in damages as will ſatisfy the injury the payee has ſuſtained. *Ledger* v. *Ewer*. 216
4. Where ſeveral perſons trade under a particular firm, and ſome, without the concurrence of the others, draw bills under that firm, all are liable to an indorſee. *Baker* v. *Charlton*. 80
5. It is no defence to an action at the ſuit of an indorſee of a bill of exchange that the bill was not ſtamped at the time of making it, if it has a proper ſtamp when produced at the trial. *Wright* v. *Riley*. 173
6. If the holder of a bill of exchange agrees not to ſue the acceptor upon his making an affidavit that the acceptance is a forgery, and ſuch affidavit is ſworn, he cannot afterwards maintain an action on the bill though the affidavit is falſe. *Stevens* v. *Thacker*. 187
7. *Aliter* if the affidavit is only ingroſſed and not ſworn. *ib.*
8. It is no excuſe for not giving notice to the *Indorſee* of a bill of exchange has the acceptor had, no effects. *Wilkes* v. *Jacks*. *Page* 202
9. When the payee of a bill of exchange has indorſed it *in blank*, no ſubſequent indorſee can reſtrain its negotiability by a *ſpecial* indorſement. *Smith* v. *Clarke*. 225

BILL OF LADING.

1. If *A.* has an equitable title to goods on board a ſhip and *B.* knowing of ſuch title gets an indorſement of the bill of lading, he cannot recover ſuch goods in an action of trover; but the captain will be juſtified in delivering the goods to *A.* *Dick* v. *Lumſden*. 189

BILL OF MIDDLESEX,

See PLEADING, No. 12.

BILL OF SALE.

1. The bill of ſale of veſſels for inland navigation need not be regiſtered. *Laroche* v. *Wakeman*. 141

BOND,

See EVIDENCE, No. 7, 8. 12. 24.

C.

CARRIER,

See TROVER, No. 1. WITNESS, No. 22.

1. By the cuſtom of the river *Thames* the maſter of a veſſel is bound to guard

guard the goods laden into a lighter ſent for them by the *conſignee* until the lading is complete, and cannot diſcharge himſelf from the obligation by telling the lighterman that he has not a ſufficient number of hands on board to take care of them. *Catley* v. *Wintringham.* *Page* 150

CONFIDENCE.

1. An interpreter who is preſent at converſations between a foreigner and his attorney is bound to the ſame ſecreſy as the attorney himſelf, and ought not to divulge the facts confided to him, after the cauſe for the purpoſe of which the confidence was placed is at an end. *Du Barré* v. *Livette.* 77
2. But a confeſſion made by a papiſt to a proteſtant clergyman may be given in evidence. *Rex* v. *Sparks.* cited. 78
3. An attorney who prepares deeds which are granted on an uſurious conſideration may be called as a witneſs to prove the uſury. *Duffin* v. *Smith.* 109

CONTRACT.

1. When a contract ſhall be ſaid to be *complete* and when *executory* vide *Set off* No. 1.
2. Where a builder is employed to do work for a certain ſum and additions are made, he is bound by the contract as far as it can be traced, and entitled to go on a *quantum meruit* for the exceſs only *Pepper* v. *Burland.* 103
3. But if the contract is wholly abandoned he may go on a *quantum meruit* for the whole work. *Page* 103

CORPORATOR,

See WITNESS, No. 24.

COSTS.

1. If an action brought under the direction of the court of chancery is defeated by a formal objection, that court will make the party taking ſuch objection pay all coſts *Wray* v. *Barwis.* 69
2. Coſts paid to a defendant in equity ought to be allowed to a Plaintiff in his coſts at law. *Comme ſemble.* *Grant* v. *Jackſon.* 204

COVENANT,

See LANDLORD AND TENANT, No. 1.

COVERTURE,

See PLEADING, No. 2.

1. If a Defendant be let in to plead on the terms of not availing herſelf of her coverture, ſhe cannot ſhew that the Plaintiff truſted her huſband and not her. *Snell* v. *Rice.* 235

CRIMINAL CONVERSATION.

1. No action lies for *crim. con.* committed, after the huſband is ſeparated from his wife. *Bartelot* v. *Hawker.* 7
2. Proof

2. Proof that the husband voluntarily permitted his wife to live in a state of adultery, goes to bar the action, and not merely to mitigate the damages. *Hodges* v. *Windham.* *Page* 39

D.

DECEIT.

1. To support an action for a false assertion as to the circumstances of a third person, it must appear that the Defendant intended to impose on the Plaintiff, and that the Plaintiff relied on his information. *Scott* v. *Lara.* 226

DEIST,

See WITNESS, No. 7.

DEED,

See EVIDENCE, No. 7, 8. 13. 24.

DIVORCE,

See WITNESS, No. 9.

DISSENTERS.

1. On an indictment for disturbing protestant dissenters in the exercise of their religious worship, it is not necessary to prove that the oaths mentioned in the Toleration Act have been taken. *Rex* v. *Hube.* 132
2. *German* Lutherans are within the protection of that act of parliament. *ib.*
3. And it is no defence to an indictment that the Defendant entered the chapel for the purpose of asserting his right to the clerk's reading desk. *Page* 132

DISTRESS.

1. Wearing apparel may be distrained for rent, under the statute. *Bisset* v. *Caldwell.* 36

E.

EAST INDIA COMPANY,

See ACTION, No. 5, 6.

EJECTMENT.

1. *Qu.* Whether a year's notice to quit is necessary where it is the custom of the country to give that notice. *Roe dem. Henderson* v. *Charnock.* 4
2. A refusal to pay rent to a devisee in a will which was contested, is not such a disavowal of the title as to entitle such devisee to maintain an ejectment without giving a previous notice to quit. *Doe dem. Williams* v. *Pasquali.* 196

ESCAPE,

See ASSUMPSIT, No. 5. WITNESS, No. 21.

EVIDENCE,

See FORGERY. PERJURY. PRODUCING EVIDENCE. PLEADING.

1. If the parties agree to a reference, and either party in the course

courſe of that reference admit a fact which the Court of Chancery would have compelled him to admit, ſuch admiſſion may be given in evidence. *Slack* v. *Buchannan*. *Page* 5

2. *Aliter* if it were an admiſſion merely for the purpoſe of purchaſing peace. *ib.*

3. In an action againſt one partner evidence may be received of the admiſſion of another. *Comme ſemble*. *Thwaites* v. *Richardſon*. 16

4. A copper-plate map taken by the direction of overſeers of the poor of a pariſh, is no evidence to prove a particular ſpot of ground a highway. *Pollard* v. *Scott*. 19

5. Hand-writing cannot be proved by a compariſon of hands. *Macferſon* v. *Thoytes*, 20. *Brookhard* v. *Woodley*. *ib.* n.

6. In an action brought againſt one partner, another may be called as a witneſs to prove the debt paid to him. *Evans* v. *Silverlock*. 21

7. If the name of a fictitious perſon be put as a ſubſcribing witneſs to the execution of a deed, proof of the party's hand-writing is ſufficient. *Fuſſet* v. *Bower*. 23

8. So if the ſubſcribing witneſs ſwears that he never ſaw it executed. *Grellier* v. *Neale*. 147

9. A ſhip-builder may be called as a witneſs to give his *opinion* as to the ſea-worthineſs of a ſhip, on the facts ſtated by others. *Thornton* v. *Royal Exchange Aſſurance Company*. 25

10. So may commercial men to prove the meaning of a particular expreſſion in a letter on a commercial ſubject. *Chaurand* v. *Angerſtein*. 43

11. Parol evidence cannot be given of the transfer of ſtock, but copies from the books of the Bank muſt be proved. *Bretton* v. *Cope*. *P.* 30

12. A transfer of ſtock is evidence on a plea of payment to an action on a bond. *ib.*

13. An inſtrument executed in the preſence of a ſubſcribing witneſs cannot be proved by any other perſon, even after it is cancelled. *ib.*

14. Where one partner delivers over a bill of exchange and abſconds, the other may be called as a witneſs to prove that his partner told him he had paid it away for a valuable conſideration. *Smith* v. *Pickering*. 50

15. Evidence that the original Defendant acknowledged the debt, is admiſſible in an action againſt the ſheriff for a falſe return. *Kempland* v. *Macauley*. 65

16. To prove the Defendant in a criminal proſecution, the author of a libel, evidence of other libels written by him, on the ſame perſon and concerning the ſame ſubject may be read. *Rex* v. *Pearce*. 75

17. So in an action, to prove the malice of the Defendant. *Lee* v. *Huſon*. 160

18. A copy of a newſpaper may be read in evidence, though not ſtamped according to act of parliament. *Rex* v. *Pearce*. 75

19. To prove the publication of a newſpaper, it is not neceſſary to produce a copy which has been actually publiſhed. *ib.*

20. Proof of the delivery of a paper to the ſervant of the Defendant in a criminal proſecution, is not of

of itſelf ſufficient to entitle the proſecutor to give parol evidence of it. *Page* 75

21. Though a witneſs cannot give parol evidence of the particular contents of written accounts, he may ſpeak to the general balance. *Roberts* v. *Doxon.* 83

22. A bond executed by the Defendant acknowledging himſelf guilty of a nuiſance, is good evidence on an indictment for carrying on the ſame buſineſs in another place. *Rex* v. *Neville.* 91

23. On a queſtion between landlord and tenant, whether rent was payable quarterly or half-yearly, evidence of the mode in which *other* tenants pay their rents is not admiſſible. *Carter* v. *Pryke.* 95

24. Where the ſubſcribing witneſs to a deed is reſident abroad, his hand-writing is to be proved as if he were dead. *Holmes* v. *Pontin.* 99

25. Parol evidence of the oaths required by the Toleration Act having been taken, is not admiſſible. *Rex* v. *Hube.* 132

26. On an iſſue whether a churchwarden ought to be elected by a ſelect veſtry or the pariſh at large, a record between a former churchwarden and another perſon is admiſſible evidence. *Berry* v. *Banner.* 156

27. An account in the hand-writing of a perſon borrowing money is no evidence for the lender in an action for uſury brought againſt him by a common informer. *Maugham qui tam* v. *Walker.* 163

28. Parol evidence of a letter containing an account of the diſhonour of a note of hand, is not admiſſible, unleſs notice has been given to produce the letter. *Shaw* v. *Markham.* *Page* 165

29. An admiſſion in an anſwer to a bill filed by other creditors againſt the Defendant may be read as evidence againſt him. *Grant* v. *Jackſon.* 203

30. If ſeveral are ſued and one pleads his bankruptcy, upon which the plaintiff enters a *nolle proſequi* as to him, he may ſtill give evidence of the admiſſion of ſuch Defendant made before he obtained his certificate. *ib.*

31. A record of conviction on an indictment againſt a pariſh for not repairing a road, is *concluſive* evidence of the liability of that pariſh to repair. *Rex* v. *Inhabitants of St. Pancras.* 219

EXECUTION.

1. If a *fi. fa.* is delivered to the ſheriff, and he is directed by the Plaintiff, not to levy thereon till a future day; and in the mean time another writ is delivered, he is to levy on the firſt writ as if no other had been delivered to him. *Kempland* v. *Macauley.* 65

EXECUTOR,

See ASSETS.

1. An executor in truſt has a ſufficient intereſt to entitle him to inſure a life, on which the teſtator had an annuity, in his own name. *Tidſwell* v. *Ankerſtein.* 151

EXECUTOR DE SON TORT.

1. A man who poſſeſſes himſelf of the goods of the deceaſed under the authority, and as agent of the rightful executor, cannot be charged as executor *de ſon tort*. *Hall* v. *Elliot*, Executor, &c. *Page* 86

F.

FALSE IMPRISONMENT,

See PLEADING, No. 5, 6.

1. If when a man is apprehended, and in the cuſtody of officers of juſtice a third perſon eſpouſes his cauſe and inſults the proſecutor, the officers may impriſon ſuch third perſon. *White* v. *Edmunds*. 89
2. A juſtice's warrant to apprehend a man for baſtardy continues in force till fully executed, and if he be apprehended and diſcharged without having fully complied with the warrant, he may be again apprehended. *Dickenſon* v. *Brown*. 234

FIERI FACIAS,

See EXECUTION.

FLEET BOOKS.

1. The *Fleet* books are *admiſſible*, though *weak* evidence on a queſtion of *pedigree*. *Lawrance* v. *Dixon*. 136
2. But to prove a *marriage*, they are not admiſſible. *Read* v. *Paſſer*. 231

FOREIGN LAWS.

1. *Engliſh* courts cannot take notice of them till proved by witneſſes. *Ganer* v. *Lady Laneſborough*. *P.* 18

FORGERY,

See BILL of EXCHANGE, No. 6, 7.

1. In an action againſt the acceptor of a bill of exchange, who defends himſelf on account of his acceptance having been forged by *A*. Evidence that *A*. had forged his acceptance to another bill, and abſconded on that account is not admiſſible. *Balcetti* v. *Serani*. 142
2. But on an indictment for forging a bank note, drawings of different parts of a bank note found in the cuſtody of the priſoner are admiſſible. *Lamb's caſe* cited. *ib*.
3. If the holder of a bill of exchange agrees not to ſue the acceptor upon his making an affidavit that the acceptance is a forgery, and ſuch affidavit is ſworn, he cannot afterwards maintain an action on the bill though the affidavit is falſe. *Stevens* v. *Thacker*. 187

FRAUDS (Statute of)

See ASSUMPSIT, No. 1.

G.

GAOLER,

See ASSUMPSIT, No. 5.

A TABLE OF THE PRINCIPAL MATTERS.

GENERAL ISSUE,

See PLEADING, No. 1. 3. 9.

GRAZIER.

1. A book-keeper in *Smithfield* market receiving money for beaſts ſold there is liable to pay ſuch money to the owner of the beaſts, and cannot apply it in payment of a debt due to him from the ſaleſman who employed him. *Goode* v. *Jones.* *Page* 177

H.

HAIR POWDER.

1. Hair powder made of ſtarch ground fine, ſtill remains ſtarch, and packages of more than 28lb. weight moved from one place to another muſt be marked as *ſtarch*. *Aitchiſon* v. *Madock.* 162

HALF PAY.

1. The king may at any time ſtop the half-pay of an officer, upon ſignifying his pleaſure that it ſhall be no longer continued. *M'Donald* v. *Steele.* 175

HAND-WRITING,

See EVIDENCE, No. 5.

HEARSAY,

See EVIDENCE, No. 14.

HIGHWAY,

See EVIDENCE, No. 4, 31. PLEADING, No. 20. WITNESS, No. 11.

HORSE-RACE.

1. On a wager that *A.* will trot two horſes 16 miles in two ſucceſſive hours, he may trot them in any manner he thinks proper. *Robſon* v. *Hall.* *Page* 127

HOUSE,

See PLEADING, No. 11.

I.

INDEBITATUS ASSUMPSIT,

See PLEADING, No. 7. 10.

INFANT.

1. *Aſſumpſit* for *money had and received* lies againſt an infant to recover money embezzled by him. *Comme ſemble. Briſtow* v. *Eaſtman.* 223
2. It is incumbent on a tradeſman before he truſts an infant with what may appear to be neceſſaries to enquire whether he is provided by his friends. *Ford* v. *Fothergill.* 229

INSOLVENT.

1. If a creditor looks over a deed of compoſition propoſed by his debtor and ſends a letter to the debtor's attorney expreſſing his approbation of it, and afterwards other creditors execute it, he cannot then withdraw himſelf from the compoſition and maintain an action. *Butler* v. *Rhodes.* 239

A TABLE OF THE PRINCIPAL MATTERS.

INTERPRETER,

See CONFIDENCE, No. 1.

JOINT AND SEVERAL,

See PROMISSORY NOTE, No. 1.

JUSTICE OF PEACE,

See NOTICE TO JUSTICES. WARRANT.

1. Qu. Whether he can commit for a contempt of him when not ſitting in court. *Pettit* v. *Addington.* *Page* 62

L.

LANDLORD AND TENANT,

See EJECTMENT. WITNESS, No. 17.

1. Qu. Whether a covenant by a leſſee of a public houſe, that he and his *aſſigns* ſhall buy all the beer conſumed in that houſe, of the leſſor, is binding on the *aſſignee.* *Hartley* v. *Pehall.* 131

LEGACY.

1. No action at law lies for a legacy. *Fariſh* v. *Wilſon.* 73

LIBEL,

See EVIDENCE, No. 16, 17.

1. The proprietor of a place of public amuſement cannot maintain an action for a libel on an actreſs whereby ſhe was deterred from appearing on the ſtage. *Aſhley* v. *Harriſon.* *Page* 194

LIMITATION OF ACTIONS.

1. The Defendant ſaying to the Plaintiff "what an extravagant bill you have delivered me" is a ſufficient acknowledgment to avoid the ſtatute of limitations. *Lawrence* v. *Worrall.* 93
2. Where there is a mutual unſettled account and reciprocal demands, the ſtatute of limitations does not attach. *Cranch* v. *Kirkman.* 121
3. The exception in that ſtatute as to *merchants' accounts*, is not confined merely to perſons of that deſcription. *ib.*
4. The Plaintiff may in any ſtage of the cauſe ſhew when a penal action was commenced. *Maugham qui tam* v. *Walker.* 163
5. If a bill filed, againſt an attorney in vacation be entitled of the preceding term and the Defendant plead the ſtatute of limitations he may ſhew when it was in fact filed. *Snell* v. *Philips* one, &c. 209

LOTTERY.

1. In an action for inſuring tickets in the *Iriſh* lottery, the act of parliament eſtabliſhing ſuch lottery muſt be proved. *Williams qui tam* v. *Pulley.* 51
2. An illegal policy of inſurance of lottery tickets may be read in evidence without being ſtamped. *Holland qui tam* v. *Duffin.* 58

3. If

3. If ſeveral tickets are inſured at the *ſame time*, it conſtitutes but one offence. *Page* 58
4. *Aliter*, if at *different* times on the *ſame* day. *ib.*

M.

MAIL COACH.

1. The proprietors of a mail coach are anſwerable for any injury happening to a paſſenger through the negligence of their driver. *White* v. *Boulton*. 81

MALICIOUS PROSECUTION.

1. If *A.* ſtrike *B.* and *B.* return the blow, on which *A.* indicts *B.* for an aſſault, the bare fact of *A.* having ſtruck the firſt blow is not ſufficient to ſupport an action for a malicious proſecution. *Fiſh* v. *Scott*. 135
2. In an action for a malicious arreſt the plaintiff muſt prove the ſheriff's warrant on the writ againſt him. *Lloyd* v. *Harris*. 174

MAP,

See EVIDENCE, No. 4.

MARINER.

1. No action will lie at the ſuit of a ſailor on a promiſe of the captain to pay extra wages in conſideration of his doing more than the ordinary ſhare of duty in navigating the ſhip. *Harris* v. *Watſon*. 72

MARRIAGE,

See FLEET BOOKS, No. 2. WITNESS, No. 10.

1. The *form* of words preſcribed by the Rubrick for the publication of banns, need not be preciſely followed, that part of the act of parliament being merely directory. *Page* 34
2. May be proved by the reputation of the family. *Reid* v. *Paſſer*. 231

MASTER AND SERVANT,

See SERVANT. WITNESS, No. 15.

1. If a clerk to the commiſſioners of taxes employ a deputy to perform the duties of his office, and new duties are impoſed, whereby ſuch deputy's labour is much increaſed, nevertheleſs he will not be entitled to an increaſe of ſalary, unleſs there is an expreſs agreement for that purpoſe. *Bell* v. *Drummond*, Executor, *&c.* 45
2. If a maſter gives his ſervant money to buy meat for the uſe of the family, and the ſervant inſtead of paying ready money orders the meat on credit and embezzles the money, the maſter is not liable. *Stubbing* v. *Heintz*. 47

MONEY HAD AND RECEIVED,

See ASSUMPSIT, No. 3, 6. BANKRUPT, No. 9. 12. INFANT, No. 1. OFFICE, No. 1.

MONEY PAID, LAID OUT, and EXPENDED,

See ASSUMPSIT, No. 4, 5.

N.

NAVAL STORES,

See WITNESS, No. 26.

NAVIGATION,

See BILL OF SALE.

NEGLIGENCE,

See MAIL COACH. SURGEON.

NEW ASSIGNMENT,

See PLEADING, No. 11.

NEWS-PAPER.

1. A newſpaper may be read in evidence though not ſtamped. *Rex* v. *Pearce.* *Page* 75
2. To prove the publication of a news-paper it is not neceſſary to produce a copy which has been actually publiſhed. *ib.*

NOTICE to PRODUCE,

See EVIDENCE, No. 28.

NOTICE to QUIT,

See EJECTMENT, No. 1, 2.

NOTICE to JUSTICES.

1. If *A.* is indicted for felony and the judge who tries the indictment, orders the juſtice before whom the information was laid, to retain the goods until it appears who is entitled to them, and ſuch juſtice is guilty of a converſion, it is not neceſſary to give a month's notice previous to the commencement of an action againſt him. *Licet* v. *Reid.* *Page* 35

NUISANCE,

See EVIDENCE, No. 22.

1. A man who ſets up a noxious buſineſs in a neighbourhood where ſuch buſineſs has long been carried on, is not indictable for a nuiſance unleſs the noxious vapour is much increaſed by his manufacture. *Rex* v. *Neville.* 91

O.

OATH,

See PLEADING, No. 14.

1. A member of the Kirk of *Scotland* may be ſworn without kiſſing the book. *Mee* v. *Reid.* 23

OFFICE and OFFICER,

See HALF-PAY.

1. When a man brings an action for money had and received to try his title to an office he muſt prove that the Defendant has received fees belonging to the office which he claims. *Green* v. *Hewett.* 182
2. The under Uſhers and Cryers of the Court of King's Bench are diſtinct offices from the Chief Uſher and Cryer, and not dependant on him. *Comme ſemble.* *ib.*

A TABLE OF THE PRINCIPAL MATTERS.

OPINION,

See EVIDENCE, No. 9, 10.

ORDER for PARTICULARS,

See SET-OFF, No. 2.

P.

PARLIAMENT.

1. In an action for the coſts of a frivolous petition againſt the election of a member of parliament, it is not neceſſary to prove either the Defendant's ſubſcription of the petition or a demand of the coſts previous to the commencement of the action. *Cleveland* v. *Wilſon.* *Page* 106

PAROL EVIDENCE OF PAPERS, &c.

See EVIDENCE, No. 11. 20, 21. 25. 28. VOIR DIRE, No. 1.

PARTNER,

See BILL OF EXCHANGE, No. 4. EVIDENCE, No. 3. 6. 14. 30. WITNESS, No. 13. 25.

1. When partners diſſolve their partnerſhip, it is incumbent on them to publiſh notice of ſuch diſſolution in the *Gazette*, or they will be all liable to the action of a creditor who did not know of the diſſolution. *Gorham* v. *Thomſon.* 42
2. And even notice in the *Gazette* is not ſufficient to affect a creditor who has not read ſuch notice. *Graham* v. *Hope.* 154
3. Partners cannot deprive their debtor of his ſet-off by indorſing a note of hand to any one in payment of a debt due from the others to him. *Puller* v. *Roe.* P. 197

PAYMENT.

1. If a debtor is directed by his creditor to remit bills by the poſt and the bills are loſt, the creditor muſt bear the loſs. *Warwicke* v. *Noakes.* 67
2. But in ſuch caſe the perſon remitting ſhould deliver the letter at the poſt-office, and not to a bellman in the ſtreet. *Hawkins* v. *Rutt.* 186

PEDIGREE,

See FLEET BOOKS, No. 1.

PERJURY,

See PLEADING, No. 3. 12. 14, 15. WITNESS, No. 8. 20. 23.

1. On an indictment for perjury committed on the trial of a former cauſe, the proſecutor muſt prove the whole of the Defendant's evidence. *Rex* v. *Jones.* 38
2. But if the perjury was committed in anſwer to a queſtion which could only ariſe on the croſs examination, it is ſufficient to prove that examination. *Rex* v. *Dowlin.* 170
3. If in an anſwer to a bill filed by *A.* for redemption of lands aſſigned to him by *B.* the Defendant ſwears *that he had no notice* of the aſſignment, and therefore inſiſts on tacking a bond debt due to him from *B.* to his mortgage, this is

a material fact on which perjury may be aſſigned. *Rex* v. *Pepys.* *Page* 138

PILOT.

1. A pilot who has the ſteering of a ſhip is liable to an action for an injury done by his perſonal miſconduct, although a ſuperior officer is on board. *Stort* v. *Clements.* 107

PLEADING,

See ATTORNEY, No. 3, 4. SET-OFF, No. 1.

1. A plea of the general iſſue to an information in the Exchequer againſt *A.* for having ſmuggled goods in his poſſeſſion, does not put in iſſue the forfeiture of the goods, and if in ſtating the record it is ſaid to be an iſſue touching and concerning the forfeiture of the goods, it is a fatal variance. *Rex* v. *Hawkins.* 8.
2. On the general replication to a plea of coverture, the Plaintiff may prove that the perſon to whom the Defendant was married, was married to another woman. *Ganer* v. *Lady Laneſborough.* 17
3. A recital that *an* iſſue came on to be tried is ſupported by evidence that an information containing *ſeveral* counts to each of which the defendant pleaded the general iſſue, was ſo tried. *Rex* v. *Jones.* 37
4. Under the *alia enormia* in treſpaſs, no facts can be given in evidence which might, conſiſtent with decency, be ſtated on the record. *Lowden* v. *Goodrick.* *P.* 46.
5. Therefore on a declaration for falſe impriſonment the Plaintiff cannot give in evidence that he was ſtinted in his allowance of food, unleſs it is ſpecially ſtated in the declaration. *ib.*
6. Or that being confined in a common priſon ſhe caught the gaol fever, unleſs it is ſpecially laid as a conſequence of the impriſonment. *Pettit* v. *Addington.* 62
7. If goods are ſold on the terms of ſale or return, and the perſon receiving them does not return them in a reaſonable time, the value of them may be recovered in an action for goods ſolds and delivered. *Bayley* v. *Goldſmith.* 56
8. In a penal action for exerciſing a trade without having ſerved an apprenticeſhip thereto, the Plaintiff is not obliged to prove that the Defendant uſed the trade all the time laid in the declaration, if it is ſaid that he forfeited 40*s.* for *each* month. *Powell qui tam* v. *Farmer.* 57
9. When the Plaintiff is in the *actual* poſſeſſion of the cloſe, the Defendant in an action of treſpaſs cannot give evidence of property in a ſtranger under the *general iſſue.* *Philpot* v. *Holmes.* 67
10. When a bankrupt promiſes to pay a debt due before his bankruptcy, the Plaintiff may declare generally on the original conſideration. *Williams* v. *Dyde.* 68
11. If *A.* be in poſſeſſion of part of a houſe, and *B.* of the reſidue, and an officer enters into *A.*'s part under a writ againſt *B.*'s goods

goods which are not there, *A.* may maintain treſpaſs againſt the officer for breaking and entering his *houſe*, and need not make any new aſſignment to a juſtification under the writ againſt *B.* *Fallon* v. *Anderſon.* *Page* 110

12. An indictment ſtating *a bill of Middleſex* to have iſſued out of the *King's Bench Office* is bad. *Rex* v. *Schoole.* 112

13. Where money betted is paid into the hands of a banker who gives a receipt to the perſons betting as received of *them*; the winner cannot recover the money on the common count on a wager, but muſt ſtate that the money was ſo paid, and that the Defendant refuſed to permit him to receive it. *Robſon* v. *Hall.* 128

14. If a witneſs who is a Scotch covenantor be ſworn on the *Teſtament*, and afterwards according to the ceremony of his own country, he may be indicted for perjury as having ſworn on the Teſtament. *Rex* v. *M'Garther.* 155

15. It is ſufficient in an indictment for perjury to ſtate that the Defendant was *in due manner ſworn.* *ib.*

16. Where in pleading it is ſtated that from time immemorial "there "has been a ſelect veſtry compoſed of a *certain* number of ſelect "perſons," it is incumbent on the party making that averment to prove that the veſtry has conſiſted of a definite number, *Berry* v. *Banner.* 157

17. So if it had been ſtated that the veſtry was compoſed of a *certain* ſelect number of perſons. *Comme ſemble.* *ib.*

18. A ſubmiſſion to arbitration may be given in evidence on a count on the original promiſe. *Kingſton* v. *Phelps.* *Page* 227

19. An averment that the Defendant is an attorney of a particular court is not proved by the production of his bill of fees for buſineſs done in that court. *Green* v. *Jackſon.* 237

20. An indictment againſt a pariſh for not repairing one ſide of a road (the other ſide laying in another pariſh) ought to ſtate that each pariſh was liable to repair *ad filum medium viæ*, and not merely that a certain part of the road *in breadth* 15 *feet* was out of repair. *Rex* v. *The Inhabitants of St. Pancras.* 219

POLICY OF INSURANCE.

1. When it is ſaid in a letter that a ſhip will ſail from *St. Domingo* in the month of *October*, it is generally underſtood that ſhe will not ſail till the 25th of that month. *Charaund* v. *Angerſtein.* 43

2. An executor in truſt has a ſufficient intereſt to entitle him to make aſſurance on the life of a perſon who has granted an annuity to his teſtator. *Tidſwell* v. *Ankerſtien.* 151

3. Where a policy is on a ſhip bound to a foreign port until ſhe is 24 hours moored *in ſafety* there, and previous to ſuch ſhip's arrival at her deſtined port an embargo is laid on all *Engliſh* veſſels in that port, and ſhe on entering it is alſo detained and her crew made priſoners of war; the aſſured is entitled to recover. *Minett* v. *Anderſon.* 211

4. When

4. When a ſhip is driven by ſtreſs of weather on an enemy's coaſt, and there captured, it is a loſs by capture and not by the perils of the ſeas. *Green* v. *Elmſlie*. *P*. 212

PRACTICE.

1. The privilege of replying, when the Defendant in a criminal proſecution does not call witneſſes, is confined to the Attorney General. *Comme ſemble*. *Rex* v. *Earl of Abingdon*. 237

PRODUCING EVIDENCE.

1. A party is not obliged to *produce* evidence againſt himſelf, though ſuch evidence is in court, and he has had notice to produce it. *Law* v. *Wells*. 93

PROMISSORY NOTE,

See BILL OF EXCHANGE. WITNESS, No. 2, 3, 4, 5, 6. 27.

1. A promiſſory note ſigned by two perſons and beginning "I promiſe, *&c.*" is joint and ſeveral. *March* v. *Ward*. 131
2. A man who at the requeſt of the holder of a note has put his name upon and thereby been *obliged* to pay the contents to a *bonâ fide* holder, may recover the money paid from any perſon whoſe name is on the note, although he knew it was given on an illegal conſideration. *Seddons* v. *Stratford*. 215

Q.

QUANTUM MERUIT,

See CONTRACT, No. 2, 3. MASTER and SERVANT, No. 1. SURVEYOR.

R.

RECEIPT,

See STAMPS, No. 1.

1. A general receipt on the back of a bill of exchange is *prima facie* evidence of a payment by the *acceptor*, and will not of itſelf be evidence of a payment by the drawer, though produced by him. *Scholey* v. *Walſby*. *Page* 25

REMITTANCE,

See PAYMENT.

RES INTER ALIOS ACTA.

Where Evidence,

See EVIDENCE, No. 26, 27. 29. 31.

S.

SERVANT,

See MASTER *and* SERVANT.

1. If a clerk to the commiſſioners of taxes employ a deputy to execute his office, and new duties are impoſed whereby ſuch deputy's labour is much increaſed, nevertheleſs he is not entitled to an increaſe of ſalary, unleſs there is an expreſs agreement for that purpoſe. *Bell* v. *Drummond*, Executor. 45

2. A maſter may maintain an action for debauching his maid ſervant, though he is no wife related to her in blood. *Fores* v. *Wilſon*. *P.* 55
3. In an action for debauching a maid ſervant *per quod &c*, it is not neceſſary to prove that ſhe was employed as a menial ſervant. *ib.*
4. So in an action for beating the Plaintiff's infant ſon, who reſided in his family. *Jones* v. *Brown*. 233
5. A father who permits a married man to viſit his daughter as a ſuitor, cannot maintain an action againſt him for ſeducing her. *Reddie* v. *Scoolt*. 241

SET-OFF.

1. If *A.* employ *B.* to build a waggon, and when it is finiſhed *B.* refuſe to deliver it until the money is paid, ſtill the contract is executed and *B.* may ſet off the money which was to have been paid for the waggon as for *goods bargained and ſold*. *Semb. Dunmore* v. *Taylor*. 41
2. Where the Plaintiff obtains an order for the particulars of the Defendant's ſet off, and upon an application to the Defendant's attorney to deliver a particular under the order, he refers to an account already delivered by his client, he is not obliged to deliver a freſh particular. *Hatchet* v. *Marſhall*. 172
3. *A.B. C.* and *D.* are in partnerſhip together, and *C.* and *D.* alſo trade on their ſeparate account: the partnerſhip of *A.* and *Co.* becomes indebted to *C.* and *D.* and to ſatisfy ſuch debt they indorſe a note given to them all. In an action by *C.* and *D.* as indorſees of the note, the debtor may ſet off any demand he has againſt *A.* and *Co. Puller* v. *Roe*. *Page* 187
4. It is no objection to the ſet-off of a debt that the Defendant had commenced an action for the recovery of it, before the Plaintiff's cauſe of action accrued. *Knibbs* v. *Hall one, &c.* 210

SHERIFF,

See ASSUMPSIT, No. 4. EVIDENCE, No. 15. EXECUTION.

SPIRITUOUS LIQUORS.

1. The ſtat. 24 *Geo.* 2. againſt ſelling ſpirituous liquors in quantities under the value of 20 *s.* does not extend to liquors ſold for the purpoſe of being ſold again. *Jackſon* v. *Attrill*. 180

STAMPS,

See LOTTERY, No. 2. NEWS-PAPER, No. 1.

1. An acknowlegement of having received the acceptance of a bill of exchange is a receipt for money within the ſtat. 23 *G.* 3. and liable to the ſtamp duty impoſed by that ſtat. on ſuch receipts. *Scholey* v. *Walſby*. 24
2. Where 2 perſons by an agreement *in writing* lay a wager, and then by another agreement indorſed on the firſt conſent that the bet ſhall be doubled, there muſt be two agreement ſtamps. *Robſon* v. *Hall*. 128

3. But

3. But if there is only one ſtamp the winner may recover the firſt bet on a count thereon. *Page* 128
4. An agreement not ſtamped cannot be given in evidence for any purpoſe whatever, not even to ſhew that the party meant to commit a fraud by that agreement. *Whitwell* v. *Dimſdale.* 167

STARCH,

See HAIR-POWDER.

SUBSCRIBING WITNESS,

See EVIDENCE, No. 7, 8. 13. 24.

SURGEON.

1. It is a good defence to an action brought by him that he has treated his patient ignorantly or negligently. *Kannen* v. *M'Mullen.* 59
2. *Aliter* if he acted under the direction of a phyſician. *ib.*

SURVEYOR.

1. He is entitled to be paid according to his labour, and not according to the amount of the bills he looks over and ſettles. *Upſdell* v. *Stewart.* 193

T.

TENDER,

See ASSUMPSIT, No. 1.

1. If *A.* be indebted to ſeveral perſons in different ſums of money, and when they are all aſſembled together, tenders them one groſs ſum, which they refuſe to receive, *each inſiſting that more is due to him*, this is a good tender. *Black* v. *Smith.* *Page* 88
2. It is not neceſſary to produce the money tendered when the creditor inſiſts that more is due. *ib.*
3. A creditor cannot object to the formality of the tender, on account of a receipt being demanded, if he did not object to it on that account at the time. *Cole* v. *Blake.* 179

TRESPASS,

See PLEADING, No. 4, 5, 6. 9.

TRIAL.

1. The Court will put off the trial on an affidavit of the *attorney* that a material witneſs is kept out of the way. *Duberley* v. *Gunning.* 97

TROVER,

See BILL OF LADING, No. 1.

1. If a carrier has goods to carry, and *by miſtake deliver them* to a wrong perſon, *trover* lies. *Youl* v. *Harbottle.* 49

V.

VARIANCE,

See PLEADING.

VENDOR AND VENDEE,

See WARRANTY.

VESTRY,

See EVIDENCE, No. 26. PLEADING, No. 16, 17.

1. A ſelect veſtry can only be ſupported by immemorial preſcription. *Berry* v. *Banner*. *Page* 157

VOIR DIRE.

1. When a witneſs is rendered incompetent by his examination on the *voir dire*, he may be aſked any queſtion to ſhew his intereſt at an end, though the act by which his intereſt is deſtroyed, is matter of record. *Botham* v. *Swingler*. 218

U.

USURY,

See CONFIDENCE, No. 3. EVIDENCE, No. 27. WITNESS, 27.

1. Where a country banker diſcounting a bill, takes intereſt for the whole time the bill has to run, and inſtead of paying money for the bill, gives notes payable in *London* 3 days after ſight, he is guilty of uſury. *Matthews qui tam* v. *Griffiths*. 200

USE AND OCCUPATION.

1. An action for uſe and occupation will not lie where the Defendant came into poſſeſſion of the premiſſes under an agreement to purchaſe, upon an aſſurance on the part of the Plaintiff that he had a long term, and where the occupation has been an injury, inſtead of a benefit to the Defendant. *Hearne* v. *Tomlin*. *Page* 192

W.

WAGER,

See HORSE RACE. PLEADING, No. 13. STAMPS, No. 2, 3.

WAGES,

See MARINER, No. 1.

WAREHOUSE-MAN.

1. A warehouſe-man is bound to common diligence only. *Califf* v. *Danvers*. 114

WARRANT.

See MALICIOUS PROSECUTION, No. 2.

1. A juſtice's warrant to apprehend the putative father of a baſtard continues in force till fully ſatisfied, and if he is arreſted and diſcharged, on a promiſe to give ſecurity, he may be again apprehended on the ſame warrant. *Dickenſon* v. *Brown*. 234

WARRANTY.

1. The ſeller is bound to diſcloſe to the buyer all latent defects known to him. *Melliſh* v. *Motteux*. 115
2. *A*. not knowing the age of a horſe, but having a written pedi-

gree, ſold him according to the pedigree, at the ſame time ſaying he knew nothing of him but what he learnt therefrom, he is not liable to an action on a warranty. *Dunlop* v. *Waugh.* *Page* 123

WITNESS,

See CONFIDENCE. EVIDENCE, No. 7, 8. 13. VOIR DIRE, No. 1.

1. A trader who has been twice a bankrupt cannot be a witneſs to increaſe his eſtate under the ſecond commiſſion, until he has paid 15 *s.* in the pound. *Kennet* v. *Greenwollers.* 3
2. In an action againſt the maker of a promiſſory note, the indorſer is an admiſſible witneſs to prove it paid. *Charington* v. *Milner.* 6
3. So is the drawer of a bill of exchange in an action againſt the acceptor. *Humphrey* v. *Moxon.* 52
4. *Qu.* Whether he can be a witneſs when it appears that he had regular notice of the diſhonour. *ib.*
5. *Qu.* Whether the drawer may be admitted to prove that the acceptance was conditional. *Phetheon* v. *Whitmore.* 40
6. Or that the bill, though dated abroad, was drawn in *England*, and is therefore void for want of a ſtamp. *Adams* v. *Lingard.* 117
7. In order to ground an objection to the competency of a witneſs, he is not to be aſked whether he believes in *Jeſus Chriſt*, or the *Holy Goſpels*, but whether he believes in *God* and a future ſtate. *Rex* v. *Taylor.* 11
8. The Defendant in a former cauſe againſt whom a verdict was obtained on the perjury of the *only* witneſs in that cauſe, and who has filed a bill for relief, cannot be a witneſs on an indictment for that perjury, although he has ſince paid the money. *Rex* v. *Dalby. P.* 12
9. A Jeweſs is a good witneſs to prove her own divorce in a foreign country, according to the rites of the Jews there. *Ganer* v. *Lady Laneſborough.* 18
10. And a man who has been in fact married may be a witneſs to prove ſuch marriage illegal. *Standen* v. *Standen.* 32
11. It is no objection to the competency of a witneſs who comes to prove a highway, that he is owner of an adjoining cloſe, and has let a road to *A.* which he cannot uſe unleſs the road in diſpute is eſtabliſhed. *Pollard* v. *Scott.* 18
12. A creditor who releaſes to the aſſignees of a bankrupt is a good witneſs to prove an act of bankruptcy. *Koopes* v. *Chapman.* 19
13. In an action by one partner, another is an admiſſible witneſs to prove the debt paid to him. *Evans* v. *Silverlock.* 21
14. In an action for ſinking a barge on board of which the Plaintiff had a cargo of corn, the maſter may be a witneſs upon being releaſed by the Plaintiff. *Spitty* v. *Bowens.* 53
15. So in an action againſt the owner for not ſafely carrying it. *Lay* v. *Holock.* 101
16. But the owner cannot be a witneſs to prove the ſhip ſea-worthy, in an action on a policy of inſurance

ance until releaſed. *Rotheroe* v. *Elton.* *Page* 84

17. No action lies againſt a witneſs for not attending unleſs the cauſe was called on and the jury ſworn. *Bland* v. *Swafford.* 60

18. In an ejectment between two perſons (both claiming under a demiſe from the ſame perſon) the landlord who has become a bankrupt, may be a witneſs to prove that the premiſſes in diſpute were not contained in the firſt leaſe. *Longchamp dem. Evits* v. *Fawcet.* 71

19. A perſon about whoſe houſe buſineſs has been done by the Plaintiff, is not a good witneſs to prove the Defendant liable, until releaſed by the Plaintiff. *New* v. *Chidgey.* 98

20. A party who has ſucceeded in a ſuit, is a good witneſs on an indictment for perjury committed in the courſe of that ſuit. *Rex* v. *D'Faria.* 104

21. A man who has been arreſted may be called as a witneſs in an action for permitting his eſcape. *Caſs* v. *Cameron.* 124

22. A book-keeper, who receives goods for a carrier, is a good witneſs for him without a releaſe. *Spencer* v. *Goulding.* 129

23. It is no objection to the competency of a witneſs on an indictment for perjury committed in an anſwer in Chancery, that in his anſwer to a croſs bill which is ſtill pending, the witneſs has ſworn the fact which he is to prove on the indictment. *Rex* v. *Pepys.* *Page* 138

24. Mere truſtees of a charity may be witneſſes in an action brought againſt themſelves in their corporate capacity. *Weller* v. *Governors of the Foundling Hoſpital.* 153

25. A man who is proved to be a partner with the Defendant cannot be examined to prove that he only is liable. *Goodacre* v. *Breame.* 174

26. The perſon giving information that the Defendant concealed naval ſtores, may be a witneſs on an indictment for the offence. *Rex* v. *Cole.* 217

27. In an action againſt the acceptor of a bill of exchange the drawer may be a witneſs to prove that it was given on an uſurious conſideration. *Rich* v. *Topping.* 224

WORDS.

1. Words which unexplained import a charge of felony are not actionable if ſpoken in reference to a breach of contract or treſpaſs. *Criſtie* v. *Cowell.* 4

2. Words ſpoken at different times, may be given in evidence on one count. *Charlter* v. *Barret.* 22

3. So in an action for words ſpoken to *A.* words (not actionable) ſpoken to *B.* may be given in evidence to increaſe the damages. *Mead* v. *Daubigny.* 125

THE END.